No. 90-1791-CFX
Status: GRANTED

Docketed:
May 16, 1991

Title: Connecticut National Bank, Petitioner
v.
Thomas M. Germain, Trustee for the Estate of
O'Sullivan's Fuel Oil Co., Inc.

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Hall,Janet C.

Counsel for respordent: Germain,Thomas M.

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Entry	Date	Note	Proceedings and Orders
1	May 16 1991	G	Petition for writ of certiorari filed.
2	Jun 18 1991		DISTRIBUTED. September 30, 1991
3	Jul 16 1991	P	Response requested -- AS. (Due August 16, 1991)
4	Aug 22 1991	X	Brief of respondent Thomas M. Germain, etc. in opposition filed.
5	Sep 18 1991	X	Reply brief of petitioner Connecticut National Bank filed.
7	Oct 7 1991		REDISTRIBUTED. October 11, 1991
8	Oct 15 1991		Petition GRANTED.
			**********
9	Nov 20 1991		SET FOR ARGUMENT TUESDAY, JANUARY 21, 1992. (3RD CASE)
10	Nov 27 1991		Brief of petitioner Connecticut National Bank filed.
12	Nov 27 1991		Joint appendix filed.
14	Dec 2 1991		Record filed.
		*	Partial proceedings United States Court of Appeals for the Second Circuit.
13	Dec 5 1991		CIRCULATED.
15	Dec 9 1991		Record filed.
		*	Certified record United States District Court for the District of Connecticut.
16	Jan 2 1992	X	Brief of respondent Thomas M. Germain, etc. filed.
17	Jan 13 1992	X	Reply brief of petitioner Connecticut National Bank filed.
18	Jan 21 1992		Argued

90-1791

No. _____

In The

Supreme Court of the United States

October Term, 1990

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,

Respondent,

v.

THE CONNECTICUT NATIONAL BANK,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Do the Courts of Appeals have jurisdiction pursuant to 28 U.S.C. § 1292(b) (1988) over certified interlocutory orders of the District Courts affirming, modifying or reversing orders entered by the Bankruptcy Courts?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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Respondent,

v.

THE CONNECTICUT NATIONAL BANK,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Connecticut National Bank ("CNB"),[1] respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit. The parties are listed in the caption.

[1] Pursuant to S. Ct. R. 29.1, petitioner is a wholly owned subsidiary of Hartford National Corporation, which is a wholly owned subsidiary of Shawmut National Corporation.

DECISION BELOW

The decision of the United States Court of Appeals for the Second Circuit determining that the court lacked jurisdiction under 28 U.S.C. § 1292(b) (1988) is reported at 926 F.2d 191 (2d Cir. 1991) and is reprinted in the attached Appendix at App. 12a–28a.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit sought to be reviewed by way of this petition was decided on February 15, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1988).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The statutes involved are reproduced in the attached Appendix at App. 1a–11a.

BASIS OF FEDERAL JURISDICTION

Jurisdiction in the Bankruptcy Court was invoked under 28 U.S.C. § 1334 (1988). Jurisdiction in the District Court was invoked under 28 U.S.C. § 158 (1988). Jurisdiction in the Court of Appeals was invoked under 28 U.S.C. § 1292 (1988), but was denied *sua sponte* under the jurisdiction of the court to determine its own jurisdiction. *See United States v. United Mine Workers of America*, 330 U.S. 258, 292 n.57 (1947).

STATEMENT OF THE CASE

BACKGROUND

In 1981, O'Sullivan's Fuel Oil Co., Inc. ("O'Sullivan's") entered into a loan agreement with First Bank, which agreement provided O'Sullivan's with a revolving line of credit of $1,000,000. As security for the money loaned to O'Sullivan's, First Bank, which later merged with The Connecticut National Bank ("CNB"), received a lien on the debtor's accounts receivable, inventory, machinery, equipment and other tangible assets. The original line of credit was subsequently reduced to $500,000, at which time the bank also agreed to a five-year term loan with the debtor in the amount of $500,000 secured by a first mortgage on the debtor's fuel storage facilities in Cromwell, Connecticut. O'Sullivan's fortunes declined, and, on January 18, 1984, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101–1146 (1988). CNB in turn filed a proof of claim. Two and one-half years later the bankruptcy court converted the Chapter 11 reorganization into a Chapter 7 liquidation, *see* 11 U.S.C. § 1112 (1988), and appointed Thomas M. Germain as Trustee for the debtor's estate.

On May 29, 1987, the Trustee commenced suit against CNB in the Superior Court for the State of Connecticut alleging that, prior to and during the course of the bankruptcy proceedings, CNB committed various tortious acts against the debtor and the debtor's estate. The counts of the Trustee's amended complaint allege (1) tortious interference; (2) coercion and duress; (3) fraudulent misrepresentation; (4) breach of an implied obligation to act

in good faith and with fair dealing; (5) violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a-110o (1987 and Supp. 1991); and (6) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1988).

On July 15, 1987, the suit was removed to the bankruptcy court. On August 24, 1987, the Trustee filed in the bankruptcy court a demand for a jury trial on all of the issues raised in the amended complaint. After the district court dismissed the Trustee's RICO claim and denied his motion to withdraw the bankruptcy reference, CNB moved in the bankruptcy court on November 2, 1988 to strike the Trustee's jury demand. On September 6, 1989, the bankruptcy court denied CNB's motion to strike.

CNB appealed the decision to the district court and, alternatively, sought leave to appeal pursuant to 28 U.S.C. § 158(a) (1988). Leave to appeal was granted by the district court on November 14, 1989. The district court affirmed and thereafter certified an appeal, exercising the power granted under 28 U.S.C. § 1292(b) (1988) for district courts to certify immediate appeals of interlocutory orders to the courts of appeals. CNB sought leave to appeal as provided by the same statute and by Fed. R. App. P. 5(a). The court of appeals dismissed the petition for lack of jurisdiction under § 1292(b) (1988), holding that in this context review by the court of appeals is limited to final decisions, judgments, orders and decrees of district courts as provided under 28 U.S.C. § 158(d) (1988). *Germain v. The Connecticut National Bank*, 926 F.2d 191 (2d Cir. 1991).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals for the Second Circuit Has Rendered a Decision in Conflict with the Decisions of Other United States Courts of Appeals on the Same Matter.

The decision below denying jurisdiction under § 1292(b) is in conflict with the decisions of other United States Courts of Appeals on the same matter. As noted by the Fourth Circuit, three views have emerged on the issue of the applicability of § 1292(b) to bankruptcy appeals, "and the circuits that have addressed this question are badly split." *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 751-52 (4th Cir. 1990).

First, there is the view that 28 U.S.C. § 158(d) (1988) precludes application of § 1292(b) (1988) with regard to all appeals in bankruptcy cases. This position was initially adopted, but later abandoned by the Court of Appeals for the Ninth Circuit. *Compare Teleport Oil Co., Inc. v. Security Pacific National Bank*, 759 F.2d 1376, 1378 (9th Cir. 1985) (adopting this approach) *with In re Benny*, 791 F.2d 712, 717-20 (9th Cir. 1986) (rejecting approach taken in *Teleport*).

The second view is that § 1292(b) (1988) is available in all bankruptcy appeals. The Court of Appeals for the Seventh Circuit has repeatedly applied this approach. *See, e.g., In re Jartran, Inc.*, 886 F.2d 859, 864-65 (7th Cir. 1989); *In re Moens*, 800 F.2d 173, 176-77 (7th Cir. 1986). *See also Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 200 n.7 (3rd Cir. 1983), *cert. denied*, 464 U.S. 938 (1983) (wherein the Court of Appeals for the Third

Circuit adopted the view that § 1293 (the predecessor to § 158) did not preclude application of other appellate jurisdiction statutes, including § 1292, to bankruptcy appeals). *See generally In re Salem Mortgage Co.*, 783 F.2d 626, 632 (6th Cir. 1986) (holding that §§ 158 and 1291 are alternative jurisdictional provisions); *Teton Exploration Drilling, Inc. v. Bokum Resources Corp.*, 818 F.2d 1521, 1524 n.2 (10th Cir. 1987) (same).

The third and final view holds that § 1292(b) is available in the bankruptcy context only when the order appealed from originates in the district court; orders originating on appeals from the bankruptcy court are governed exclusively by 28 U.S.C. § 158(d) (1988). *See, e.g., Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 752-54 (4th Cir. 1990); *Browning v. Navarro*, 887 F.2d 553, 557 (5th Cir. 1989). The decision below adopts this third approach.

II. The Court of Appeals for the Second Circuit Has Rendered a Decision in Conflict with its Own Precedent.

As stated by the Court of Appeals for the Second Circuit below, "[o]ur cases are in disarray on the jurisdictional question." App. 16a. A discussion of the conflicting precedents is provided in the court of appeals' written opinion. *See also In re Duplan Corp.*, 591 F.2d 139, 148 (2d Cir. 1978) (under former Bankruptcy Act, suggesting § 1292(b) as appropriate vehicle for appellate review of district court order in a bankruptcy case).

A similar intra-circuit split also exists in other jurisdictions. The Fifth Circuit Court of Appeals initially adopted the position that § 158(d) precludes application

of § 1292. In *In re Barrier*, 776 F.2d 1298, 1299 (3d Cir. 1985), the Court of Appeals for the Third Circuit stated "[t]he bankruptcy appellate scheme now enacted in 28 U.S.C. § 158, which appears to be comprehensive, clearly supersedes 28 U.S.C. § 1291, covering appeals from final judgments of the district court, and would inferentially appear to supersede § 1292 as well." However, in *In re Topco, Inc.*, 894 F.2d 727, 736 (5th Cir. 1990), the Court of Appeals for the Fifth Circuit disapproved *Barrier*, holding that § 158(d) concurrently grants jurisdiction along with § 1291. *Accord In re Texas Research, Inc.*, 862 F.2d 1161, 1162 (5th Cir. 1989) (holding § 1291 available to orders of district courts reviewing bankruptcy court decisions). Switching sides once again, however, the Court of Appeals for the Fifth Circuit later ruled "§ 158 clearly supersedes 28 U.S.C. § 1291, and, by inference also supersedes section 1292." *In re Hester*, 899 F.2d 361, 365 (5th Cir. 1990). *See also Browning v. Navarro*, 887 F.2d at 557 (holding that § 1292(b) is applicable to bankruptcy orders originating in the district court). A similar divergence of authority exists within the Ninth Circuit, *see In re Benny*, 791 F.2d at 717-720 (discussing inconsistent precedents), and also possibly within the Third Circuit. *Compare Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d at 200 n.7 (suggesting § 1292 is available) with *In re Brown*, 803 F.2d 120, 122 (3d Cir. 1986) (suggesting in dicta that § 158 is exclusive).

Accordingly, not only is there disagreement between the circuits, there is also sharp disagreement within the circuits as well.

III. The Court Below Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The question decided by the Court of Appeals for the Second Circuit is an important question of federal law which has not been, but should be, settled by this Court. Since the matter involves the jurisdiction of the federal appellate courts, it also implicates the jurisdiction of this Court. If a broad category of bankruptcy appeals is to be unreviewable by this Court, it seems appropriate for this Court to decide the issue, particularly where the Courts of Appeals disagree among themselves.

Further, a significant number of courts have addressed the issue. Given the ample consideration provided to date on the question, it now appears ripe for resolution.

IV. The Court of Appeals Has Decided a Federal Question in a Way That Conflicts with Applicable Decisions of This Court.

The Court of Appeals for the Second Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court. The court of appeals reasoned that § 1292 is implicitly "repealed" with regard to interlocutory decisions of bankruptcy courts appealed through the district courts. Such an approach runs counter to the rule that statutes capable of co-existence are, whenever possible, to each be given effect. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *U.S. v. Borden Co.*, 308 U.S. 188, 198 (1939). Such an approach also runs counter to the rule disfavoring implicit repeals when a legislative intent to repeal is not "clear and manifest." *See*

Rodriguez v. United States, 480 U.S. 522, 524 (1987); *Radzanower, supra*, 426 U.S. at 154; *Borden, supra*, 308 U.S. at 198; *Red Rock v. Henry*, 106 U.S. 596, 602 (1883). As noted by the Court of Appeals for the Seventh Circuit, there is nothing in either the text of 28 U.S.C. § 158(d) (1988) or its legislative history that demonstrates that Congress intended the outcome reached by the court below. *In re Moens*, 800 F.2d 173, 177 (7th Cir. 1986).

CONCLUSION

For the foregoing reasons, it is respectfully requested that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Counsel for Petitioner
The Connecticut National Bank

May 16, 1991

No. _____

In The

Supreme Court of the United States

October Term, 1990

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,

Respondent,

v.

THE CONNECTICUT NATIONAL BANK,

Petitioner.

APPENDIX

APPENDIX TABLE OF CONTENTS

28 U.S.C. § 151 (1988)

§ 151. Designation of bankruptcy courts

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court (Added Pub.L. 98-353, Title I, § 104(a), July 10, 1984, 98 Stat. 336.)

28 U.S.C. § 157 (1988)

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after

considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceedings related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(Added Pub.L. 98-353, Title I, § 104(a), July 10, 1984, 98 Stat. 340, and amended Pub.L. 99-554, Title I, §§ 143, 144(b), Oct. 27, 1986, 100 Stat. 3096.)

28 U.S.C. § 158 (1988)

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges

under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under section (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(Added Pub.L. 98-353, Title I, § 104(a), July 10, 1984, 98 Stat. 341, and amended Pub.L. 101-650, Title III, § 305, Dec. 1, 1990, 104 Stat. 5105.)

28 U.S.C. § 1292 (1988)

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the

parties to admiralty cases in which appeals from final decrees are allowed.

[(4) Repealed. Pub.L. 97-164, Title I, § 125(a)(3), Apr. 2, 1982, 96 Stat. 36]

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Claims Court under section 1631 of this title.

(B) When a motion to transfer an action to the Claims Court is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Claims Court pursuant to the motion shall be carried out.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 125, 96 Stat. 36; Nov. 8, 1984, Pub.L. 98-620, Title IV, § 412, 98 Stat. 3362; Nov. 19, 1988, Pub.L. 100-702, Title V, § 501, 102 Stat. 4652.)

28 U.S.C. § 1334 (1988)

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive juris-

diction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

(As amended July 10, 1984, Pub.L. 98-353, Title I, § 101(a), 98 Stat. 333; Pub.L. 99-554, Title I, § 144(e), Oct. 27, 1986, 100 Stat. 3096; Dec. 1, 1990, Pub.L. 101-650, Title III, § 309(b), 104 Stat. 5113.)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1989

(Submitted July 17, 1990 Decided: February 15, 1991)

Docket No. 90-8054

THOMAS M. GERMAIN,
TRUSTEE FOR THE ESTATE
OF O'SULLIVAN'S FUEL OIL
CO., INC.,
Plaintiff-Respondent,

v.

THE CONNECTICUT
NATIONAL BANK,
Defendant-Petitioner.

Before: WINTER, MAHONEY and WALKER,
Circuit Judges.

Petitioner seeks leave to appeal from a district court order affirming an interlocutory order of the bankruptcy court. We hold that we have no jurisdiction and dismiss the petition.

Thomas M. Germain, Hartford, Connecticut,
for Plaintiff-Respondent.

G. Eric Brunstad, Hartford, Connecticut
(Janet C. Hall, Robinson & Cole,
Hartford, Connecticut, of counsel),
for Defendant-Petitioner.

WINTER, *Circuit Judge:*

This petition for leave to appeal raises the question of whether we have appellate jurisdiction under 28 U.S.C. § 1292(b) to review a district court order affirming an interlocutory order entered by the bankruptcy court. This issue turns on whether 28 U.S.C. § 158(d) precludes by negative implication interlocutory review under Section 1292. We conclude that it does and dismiss the petition.

BACKGROUND

In 1981, O'Sullivan's Fuel Oil Co., Inc. ("O'Sullivan") borrowed $500,000 from First Bank. As security, First Bank, which later merged with The Connecticut National Bank ("CNB"), received a mortgage lien on O'Sullivan's fuel oil facility. O'Sullivan's fortunes declined, and, on January 18, 1984, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-74 (1988). CNB in turn filed a proof of claim. Two and one-half years later the bankruptcy court converted the Chapter 11 reorganization into a Chapter 7 liquidation, *see* 11 U.S.C. §§ 701-66 (1988), and appointed Thomas M. Germain as Trustee for the debtor's estate.

On June 1, 1987, Germain, as Trustee, commenced an action against CNB in a Connecticut state court. The suit alleged that beginning in November 1983, roughly two months before O'Sullivan filed for bankruptcy protection, First Bank attempted to assume control of the company by demanding *inter alia* that O'Sullivan surrender control of the business and its assets to an individual of the Bank's choosing, that O'Sullivan file a Chapter 11 proceeding utilizing a law firm selected by the Bank, and that

O'Sullivan replace its insurance agency. Based on these and subsequent alleged efforts to assert control, the Trustee sought damages based on various claims sounding in tort and contract, a claim under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. Ann. §§ 42-110a to 110q (West 1987 & Supp. 1990), and, of course, a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68 (1988).

CNB removed the action to bankruptcy court, whereupon the Trustee filed a demand for a jury trial and moved to withdraw the bankruptcy court's reference. After the district court dismissed the Trustee's RICO claim and denied his motion to withdraw the bankruptcy reference, CNB moved before the bankruptcy court to strike the Trustee's jury demand. The bankruptcy court denied CNB's motion on the ground that the Trustee was seeking money damages based on tort and contract claims and thus was entitled to a jury trial. CNB sought leave to appeal to the district court which was granted pursuant to 28 U.S.C. § 158(a). The district court affirmed and thereafter certified an interlocutory appeal under 28 U.S.C. § 1292(b). CNB seeks leave to appeal as provided by Fed. R. App. P. 5(a).

DISCUSSION

Appellate jurisdiction over bankruptcy court decisions exists in district courts pursuant to 28 U.S.C. § 158(a)[1] or in bankruptcy appellate panels in circuits where such a panel has been established under Section 158(b).[2] Section 158(d) provides for review by courts of appeals of "final" orders of a district court or bankruptcy panel.[3] Because

Section 158(d) does not provide for court of appeals jurisdiction over interlocutory orders of a district court reviewing an order of a bankruptcy court, CNB seeks to invoke our jurisdiction under 28 U.S.C. § 1292(b).[4]

Although both parties appear desirous of our hearing the appeal, we *sua sponte* address the question whether Section 158(d) precludes by negative implication appellate jurisdiction under Section 1292(b) of interlocutory decisions rendered under Section 158(a). This issue is not without difficulty. Unless Section 158(d) provides the exclusive means of court of appeals review of orders entered under Subsection (a), it is arguably superfluous because courts of appeals already have appellate jurisdiction under 28 U.S.C. § 1291 over final decisions of district courts. If Section 158(d) is exclusive, of course, then we have no jurisdiction under Section 1292(b).

However, reading Section 158(d) as the exclusive basis for appellate jurisdiction creates an anomaly in that a district court may withdraw any matter from the bankruptcy court under 28 U.S.C. § 157(d), and its decisions are thereafter reviewable under Sections 1291 and 1292. *See In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1282-83 (2d Cir. 1990). If Section 158(d) is exclusive, then interlocutory orders entered by district courts that have withdrawn a case under Section 157(d) would be reviewable, if injunctive in nature, under Section 1292(a)(1) or, if not injunctive, upon certification under Section 1292(b), while identical interlocutory orders entered under Section 158(a) would be unreviewable. It is tempting, therefore, to say that interlocutory orders entered under Section 158(a) are reviewable under Section 1292. However, that may create

a new anomaly. Section 158(d) provides appellate jurisdiction for final orders entered under Subsections (a) and (b). Subsection (b) provides for the creation and operation of appellate panels of bankruptcy judges, and, arguably, it would overly stretch Section 1292 to hold that an order entered by such an appellate panel under Subsection 158(b) might be subject to review as an interlocutory injunction under Section 1292(a)(1) or discretionary review after certification under Section 1292(b).

Our cases are in disarray on the jurisdictional question. In *In re Johns-Manville Corp.*, 824 F.2d 176 (2d Cir. 1987), we held that the district court's affirmance of an order denying a request for appointment of a shareholders' committee was non-final within the meaning of Section 158(d). In doing so, we relied on the view that the law provides

> adequate avenues of immediate appellate review for denial of motions to appoint shareholder committees without automatic, immediate access to the courts of appeals during the pendency of a bankruptcy proceeding. Under 28 U.S.C. § 158(a), district courts are authorized to review interlocutory orders of the bankruptcy courts. Moreover, district courts may certify for appeal to the courts of appeals any interlocutory order meeting the statutory criteria of 28 U.S.C. § 1292(b).

Id. at 180. Our next brush with this issue was *LTV Corp. v. Farragher (In re Chateaugay Corp.)*, 838 F.2d 59 (2d Cir. 1988). That case involved Section 1292(a)(1) rather than Section 1292(b), but we perceive no principled grounds for distinguishing between these subsections for purposes of determining our appellate jurisdiction. *LTV* held that

we lacked jurisdiction to hear an appeal from a district court's vacating and remanding an injunctive order entered by the bankruptcy court for entry of a new order. In doing so, *LTV* stated:

> Nor are we persuaded by the argument . . . that sections 1291 and 1292 of Title 28 (allowing appeals from district court final decisions and certain interlocutory orders, 28 U.S.C. §§ 1291, 1292) provide jurisdiction in this case. The order . . . is not final as required by section 1291, and, while we have recognized the applicability of section 1292 to determinations made by a district court sitting in bankruptcy, *see In re Feit & Drexler, Inc.*, 760 F.2d 406, 411-13 (2d Cir. 1985), we believe that section 158(d) remains the exclusive basis for jurisdiction for decisions entered under paragraphs (a) and (c) of section 158. . . . Therefore, our finding that the district court's decision was not final requires us to conclude that we have no authority to hear this action under section 158(d).

Id. at 62-63. *LTV* made no mention of *Johns-Manville*, although the pertinent language in *LTV* is, in contrast to the language in *Johns-Manville*, clearly a holding.

LTV, however, appears never to have been cited for that holding, perhaps because the West Publishing Co. did not accord a headnote to it. The next year, *NLRB v. Goodman*, 873 F.2d 598 (2d Cir. 1989), held to the contrary without referring to *LTV*. In that case, we reviewed a district court's remand of an issue that was related to an interlocutory injunction. We held:

> Ordinarily, a remand to the bankruptcy court by a district court is not a final, appealable order under 28 U.S.C. § 158(d) (1982), unless the remand effec-

> tively settles an issue and orders the bankruptcy court to perform merely a ministerial task. *See In re Vecko, Inc.*, 792 F.2d 744 (8th Cir. 1986); *In re Fox*, 762 F.2d 54 (7th Cir. 1985). In this case, however, the Bankruptcy Court effectively enjoined the Labor Board from proceeding against Goodman and [another party]. The District Court's order, although remanding a substantive issue for reconsideration by the Bankruptcy Court, refused to dissolve the injunction. The order is therefore appealable under 28 U.S.C. § 1292(a)(1) (1982).

Id. at 601-02. Since then, in *New York State Department of Taxation and Finance v. Hackeling (In re Luis Elec. Contracting Corp.)*, 917 F.2d 713, 716-17 (2d Cir. 1990), we have exercised appellate jurisdiction, without addressing the issue, over an interlocutory injunction issued by a bankruptcy court and affirmed by a district court.

The disarray of our decisions is matched by similar disagreements among the circuits, which are amply described in *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749 (4th Cir. 1990), and need not be detailed here. Although *Goodman* appears to be our latest holding on this matter, we address the issue *de novo* and have circulated this opinion to the active members of the court. *See United States v. Reed*, 773 F.2d 477, 478 (2d Cir. 1985).

We conclude that Section 1292(b) does not provide jurisdiction in the instant matter. To be sure, nothing in Section 158(d) expressly negates jurisdiction. That provision simply does not mention interiocutory appeals. The fact that it would appear to be superfluous if not our exclusive source of our jurisdiction does, however, imply that it is exclusive. More importantly, the legislative history

of Section 158(d) indicates that Congress intended to limit court of appeals jurisdiction over decisions of bankruptcy courts to final decisions.

Section 158(d)'s predecessor was 28 U.S.C. § 1293(b), which differed in language but not in substance. *See* Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, § 236(a), 92 Stat. 2549, 2667. Although enacted in 1978, Section 1293(b)'s effective date was in 1984. *See id.* at § 402(b), 92 Stat. 2549, 2682. Before it became effective, Section 158(d) was passed, apparently as a substitute for Section 1293(b). *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, § 104, 98 Stat. 333, 341. Most of the pertinent legislative history, therefore, is in the Bankruptcy Act of 1978.

The course of events in Congress leading to passage of Section 1293(b) appears to have been as follows. The bill passed by the House, H.R. 8200, would have conferred Article III status upon bankruptcy judges and would have treated bankruptcy courts as on a par with district courts. It thus would have eliminated the longstanding practice of appellate review of bankruptcy court decisions by district courts and would have amended Section 1291 to provide for direct appellate review of bankruptcy decisions by courts of appeals. It similarly would have amended Section 1292 to provide for direct appeals from interlocutory orders of bankruptcy courts in the case of injunctions or certified questions. H.R. 8200, 95th Cong., 2d Sess., 124 Cong. Rec. 1786 (Feb. 1, 1978) (setting forth sections 237-39 of bill); *id.* at 1804 (passage of bill). That the implications of this were fully understood is made clear by the discussion in the relevant House Report concerning

these provisions and in particular their impact on the caseload of the courts of appeals. H.R. Rep. No. 595, 95th Cong., 2d Sess. 40-43, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6001-04.

The Senate bill, S. 2266, as reported out by the Judiciary Committee, did not confer Article III status on bankruptcy judges and would have continued the practice of appeals to the district courts. It contained no explicit provision for subsequent review by the courts of appeals. The Senate Judiciary Committee Report did contain the puzzling statement that "[a]ppeals may be taken by writ of certiorari from the district court to the United States court of appeals . . . 28 U.S.C. § 1291." S. Rep. No. 989, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5804. There was, however, no provision in S. 2266 establishing a certiorari procedure, and the Report's remark may well have reflected a misunderstanding of Section 1291. In any event, on the Senate floor, the text of S. 2266 was substituted for the text of H.R. 8200. 124 Cong. Rec. 28284 (Sept. 7, 1978).[5] When this substitution was made, the provisions of S. 2266 relevant to the instant matter were as reported out of the Judiciary Committee.

Although the House and Senate versions of H.R. 8200 differed, no conference was held. Instead, on September 28, the House voted to accept the Senate version of H.R. 8200 subject to further amendments. 124 Cong. Rec. 32350, 32420 (Sept. 28, 1978). In accepting the Senate version, the House abandoned the original provisions of H.R. 8200 that had amended Sections 1291 and 1292 to allow direct appeals from final and interlocutory orders of bankruptcy courts to courts of appeals. However, the House also added amendments to the substitute, three of which are pertinent to the instant matter. First, it created a new Section 1293 in Title 28 that provided for court of appeals jurisdiction over final decisions of the new bankruptcy panels and court of appeals jurisdiction over final decisions of bankruptcy courts if the parties agreed to such a direct appeal. 124 Cong. Rec. 32385 (Sept. 28, 1978). Second, Section 1334 of Title 28 was amended to provide for appellate review by district courts of final orders of bankruptcy courts and district court review of interlocutory orders of bankruptcy courts but only by leave of the district court. *Id.* Third, it provided for review of final decisions and interlocutory decisions (again upon leave) of bankruptcy courts by appellate bankruptcy panels in a new 28 U.S.C. § 1482. *Id.* at 32386. None of the September 28 amendments addressed court of appeals jurisdiction over decisions of district courts reviewing decisions of bankruptcy courts.

The action then returned to the Senate. The Senate concurred in the House's amendments, but added yet further amendments of its own. 124 Cong. Rec. 33989-34019 (Oct. 5, 1978). One of the October 5 Senate amendments added language to the new Section 1293(b) that was in substance what is now provided by Section 158(d), namely court of appeals jurisdiction over "final" decisions of district courts reviewing a bankruptcy court. *Id.* at 33991. The House then adopted the Senate amendments. 124 Cong. Rec. 34143 (Oct. 6, 1978).

In 1984, Congress adopted with only cosmetic changes the scheme of the 1978 Act concerning appellate review.

Section 158(a) provided for district court review of final bankruptcy court orders and district court review of interlocutory bankruptcy court decisions by leave of the district court. Section 158(d) provided for court of appeals review of final decisions of a district court reviewing decisions of a bankruptcy court. The only further wrinkle occurred when Congress added the procedure for district court withdrawal of a matter from the bankruptcy court. 28 U.S.C. § 157(d). No appellate procedures were provided for decisions in withdrawn cases, and Sections 1291 and 1292 are applicable in light of the fact that withdrawn cases are within the original jurisdiction of district courts. *See In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1282-83 (2d Cir. 1990).

Some of the confusion concerning Section 158(d) may have arisen from the complexity of the interplay between the two houses of the Congress and the lack of commentary on issues concerning court of appeals jurisdiction during proceedings on the floor. The House Committee Report, as noted, contained an explicit discussion of the issue. The Senate Report, as also noted, was more enigmatic and perhaps reflected a misunderstanding of appellate jurisdiction as it existed at the time. Although major changes occurred thereafter, including deletion of the provisions of H.R. 8200 that would have authorized review under Sections 1291 and 1292, there was no commentary on the floor of either House regarding these changes, and the lack of a conference eliminated whatever light might have been shed by a conference report.

Nevertheless, this is a case of actions speaking louder than words, and the events described above reflect a

deliberate congressional intent to limit court of appeals jurisdiction over bankruptcy decisions. The interplay between the House and Senate was conscious and informed as each responded to changes proposed by the other. The original bill passed by the House gave to the courts of appeals direct appellate jurisdiction over bankruptcy courts by appropriate amendments to Sections 1291 and 1292. When the Senate chose to continue appellate jurisdiction in district courts, the House acceded by deleting the proposed amendments to Sections 1291 and 1292 and substituting provisions for appellate review by district courts of final bankruptcy court decisions and of interlocutory bankruptcy court decisions upon leave of the district court. The House did not include in this amended version any explicit provision for court of appeals review of either final or interlocutory decisions of district courts reviewing decisions of bankruptcy courts. Although final decisions might be reviewable under Section 1291, review of interlocutory decisions would have been severely limited because such review would appear to have been limited to cases in which the district court had already granted leave. In those circumstances, the Senate's subsequent addition of the substance of Section 158(d) providing for court of appeals review of final decisions of district courts reviewing bankruptcy decisions strongly indicates that court of appeals jurisdiction was intended to be limited to review of such final decisions.

The creation of the withdrawal procedure in 1984, however, created an apparently unnoticed anomaly. If Section 158(d) precludes court of appeals review of interlocutory decisions of bankruptcy courts, including injunc-

tions, Supreme Court review also will be barred. In such circumstances, interlocutory bankruptcy decisions by district courts, including injunctions, acting in their original jurisdiction after a withdrawal of referral under Section 157(d), would be subject to review by a court of appeals and by the Supreme Court. However, an interlocutory decision by a bankruptcy court, involving the identical legal issue, would be subject only to discretionary review by district courts. No further review would be available. Court of appeals and Supreme Court jurisdiction would thus depend entirely on whether the district court had maneuvered the appeal into the proper procedural posture. A district court desiring to make appellate review available under Section 1292 could withdraw the bankruptcy court's reference and reaffirm that court's interlocutory order. A district court wishing to avoid such review could do so by not withdrawing reference to the bankruptcy court.

We are unpersuaded, however, that this anomaly is cause to treat Section 158(d) as superfluous and to ignore its history. First, the history detailed above indicates that in 1978 Congress intended to eliminate court of appeals jurisdiction over interlocutory orders of bankruptcy courts. The oversight, if any, occurred in 1984 when the withdrawal procedure was introduced, subjecting interlocutory decisions of district courts in withdrawn cases to review under Section 1292.

Second, the anomaly is not fatally serious. Even if review of an interlocutory district court decision in a non-withdrawn case was available under Section 1292(b), that review could be avoided by a district court's declining to

grant leave under Section 158(a). Moreover, whether Section 1292 can be stretched to include review of interlocutory decisions of bankruptcy panels seems at least in doubt. Finally, there is rough, if not complete, symmetry in limiting interlocutory appeals to: (i) discretionary review by the district court under section 158(a) in non-withdrawn cases, and (ii) court of appeals review of interlocutory decisions in withdrawn cases under Section 1292.

The Third Circuit has strongly argued against giving force to the negative implication of Section 158(d) and stated in *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 200 n.7 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983):

> Given the enormity of the change in law which would bar all court of appeals and Supreme Court review of interlocutory orders in bankruptcy cases, and the complete absence of discussion of such a change [in the legislative record], we are not ready to assume without critical analysis that those courts which have held such review to be barred are correct.

Thus, if Section 158(d) precludes interlocutory review under Section 1292, "the bankruptcy courts have been given pendente lite powers, subject only to district court review, equivalent to those exercised by the federal circuit courts prior to the passage of the Evarts Act in 1891." *Coastal Steel*, 709 F.2d at 199.

We by no means suggest that these arguments lack force as policy statements. Indeed, it might also be argued that the result we reach is not consistent with the canon

of construction disfavoring repeals by implication. Such an argument, however, ignores the fact that Section 1291 is clearly "repealed" with regard to all interlocutory decisions of bankruptcy courts except for those for which leave to appeal is granted by a district court under Section 158(a). The "repeal" we infer from Section 158(d) is thus part of a far greater explicit repeal. The canon disfavoring interpretations that render statutory language superfluous – as would be the fate of Section 158(d) were we to adopt a different result – would thus seem to prevail. Canons aside, we have concluded that Congress made a deliberate and informed policy decision that is binding upon us. This conclusion is in accord with the weight of opinion in other circuits. *See Capitol Credit Plan of Tenn., Inc. v. Shaffer,* 912 F.2d 749, 754 (4th Cir. 1990) (§ 1292(b) inapplicable); *In re Atencio,* 913 F.2d 814, 816 (10th Cir. 1990) (§ 1292(a) inapplicable); *In re Kaiser Steel Corp. (Kaiser Steel Corp. v. Frates),* 911 F.2d 380, 386 (10th Cir. 1990) (§ 1292(b)); *In re Hester (Hester v. NCNB Tex. Nat'l Bank),* 899 F.2d 361, 365 (5th Cir. 1990) (§ 1292(a)); *In re First South Sav. Ass'n,* 820 F.2d 700, 708-09 (5th Cir. 1987) (§ 1292(a)); *In re Teleport Oil Co. (Teleport Oil Co. v. Security Pac. Nat'l Bank),* 759 F.2d 1376 (9th Cir. 1985) (§ 1292(a)). *But see In re Jartran Inc.,* 886 F.2d 859, 865 (7th Cir. 1989) (§ 1292(b)).

Dismissed.

ENDNOTES

[1] Section 158(a) reads:

> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 158(a) (1988).

[2] Section 158(b) reads in pertinent part:

> (1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.
>
> (2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

28 U.S.C. § 158(b) (1988).

[3] Section 158(d) reads:

> The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 158(d) (1988).

[4] Section 1292(b) reads, in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal

from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. . . .

28 U.S.C. § 1292(b) (1988).

[5] Two weeks later, Senator Byrd requested and received unanimous consent to vitiate the passage of H. R. 8200 and offer an amendment in the nature of a substitute deleting certain references to federal taxes and certain provisions that amended the federal tax laws. 124 Cong. Rec. 30960 (Sept. 22, 1978). However, that detour has no bearing on the jurisdictional amendments here pertinent.

90-1791

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,
Respondent,

v.

THE CONNECTICUT NATIONAL BANK,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On The Brief:
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QUESTION PRESENTED FOR REVIEW

1) Whether no special and important reasons exist to review the Court of Appeals well reasoned determination that it lacked jurisdiction, pursuant to 28 U.S.C. §§ 158(d), and § 1292(b) over an appeal from the order of the District Court, affirming a certified interlocutory order of the Bankruptcy Court.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS - Continued

PAGE(S)

TABLE OF AUTHORITIES

CASES **PAGE(S)**

TABLE OF AUTHORITIES - Continued

CASES **PAGE(S)**

TABLE OF AUTHORITIES - Continued

CASES PAGE(S)

FEDERAL STATUTES PAGE(S)

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Respondent, Thomas M. Germain, Trustee for the estate of O'Sullivan's Fuel Oil Co., Inc. ("Trustee"), respectfully requests that

petitioner, The Connecticut National Bank ("CNB") request for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit be denied. All parties to the proceeding in the Court of Appeals whose decision is sought to be reviewed, are as set forth in the caption.

For purposes of this review, the respondent agrees generally with the statements on the Decision below, Jurisdiction, and the Statement of the Case as set forth in Petitioner's brief at pages 1-4. The decision of the United States Courts of Appeals for the Second Circuit is reprinted in the Appendix to the Petitioner's Brief ("Petioner's App.") at pages 12a-28a.

SUMMARY OF ARGUMENT

There are no special and important reasons to review the Court of Appeals' determination that it lacked jurisdiction over petitioner's appeal from the order of the District Court affirming the certified interlocutory order of the Bankruptcy Court pursuant to 28 U.S.C. § 158(d). The result reached below by the well respected judges on the Second Circuit Court of

Appeals is well reasoned, logical and amply supported by the legislative history of § 158. Notwithstanding CNB'S broad assertions to the contrary, there are no decisions of this Court which conflict with the decision below. While there may be a few cases in the Federal Circuit Courts of Appeals appearing to the contrary, the great weight of authority in the Circuits are in comport with the result reached in the instant case. Moreover, the Petitioner's reliance on the majority of these cases cited in his brief is misplaced as they address the issue of jurisdiction over final judgments rather than interlocutory orders of the Bankruptcy Court. Appellant jurisdiction of the Courts of Appeals over all interlocutory orders of the bankruptcy court is neither a compelling nor a substantially important issue to consider and the Second Circuit's decision is in harmony with the strong public policy against piecemeal interlocutory review of federal court actions.

REASONS FOR DENYING THE WRIT

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS TO REVIEW THE COURT OF APPEALS' DETERMINATION THAT IT LACKED JURISDICTION TO REVIEW A CERTIFIED INTERLOCUTORY ORDER OF THE BANKRUPTCY COURT.

After a long, careful and exhaustive consideration of the issue, the Second Circuit determined that it lacked appellant jurisdiction, pursuant to 28 U.S.C. § 158(d) to hear an appeal from an interlocutory order of the Bankruptcy Court. *Germain v. The Connecticut National Bank*, 926 F.2d 191 (2nd Cir. 1991). In reaching this decision, the court made a detailed examination into the legislative history of 28 U.S.C. §§ 158 and 1292, the latter dealing generally with appellant review of interlocutory orders of federal district courts. Petitioners App. at 18a-25a. From the language of the statutes and from the legislative history, the court concluded that it lacked jurisdiction over the interlocutory order pursuant to § 158. *Id.*

While § 1292(b) applies generally to appellate jurisdiction over interlocutory

appeals, § 158(d) grants a court of appeals "jurisdiction of appeals from all final decisions, judgments, orders and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d). Under § 158, the district court is granted "jurisdiction to hear appeals from final judgments, orders and decrees, *and with leave of the court, from interlocutory orders and decrees* of bankruptcy judges." 28 U.S.C. § 158(a) (emphasis added). In addition to the fact that § 158(d) would be otherwise superfluous, the legislative history of § 158(d) and its predecessor § 1293(b) delineated a clear and deliberate intent of Congress to limit direct appellate review of piecemeal interlocutory orders of bankruptcy judges by Courts of Appeals. Petitioner's App. at 22a-26a. The Court concluded that with regard to interlocutory appeals from bankruptcy courts, § 158 was the exclusive source of jurisdiction and in accord with the great weight of opinion in other circuits, it lacked jurisdiction to hear petitioner's appeal. *Id.* at 26.

II. THE COURT OF APPEALS HAS DECIDED A SUBSTANTIALLY UNIMPORTANT QUESTION OF FEDERATE LAW CONCERNING INTERLOCUTORY ORDERS OF BANKRUPTCY COURTS WHICH DOES NOT REQUIRE THIS COURT'S REVIEW.

The question decided by the Court of Appeals for the Second Circuit is not a substantially important question of federal law which must be reviewed.[1] The Court of Appeals' decision is in comport with the strong policy against piecemeal interlocutory review except where such appeal is expressly authorized by statute. *See Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1309 (1977)(per Rehnquist, J., as Circuit Justice). This is a serious reflection of the delays, inconvenience and costs of such review.

Pursuant to § 158(a), the district court has the authority to review interlocutory orders of bankruptcy judges, filed with leave of court. Thus a litigant is provided with appellate review of a bankruptcy judge's interlocutory orders. The fact that a court of appeals may not hear appeals from interlocutory orders from bankruptcy judges does not bar all or even the most important review. Interlocutory orders are merged into final judgment and are reviewable on appeal from the final judgment.

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[1] *But see Tidewater Oil Co. v. United States*, 409 U.S. 151, 153 (1972)(granting certiorari to decide whether Expediting Act, 15 U.S.C. § 29 precluded appellate jurisdiction over interlocutory appeals in a civil antitrust action pursuant to 28 U.S.C. § 1292(b)).

Thus, all review is not denied and does not discourage or prevent a litigant from appealing a final order, decree or decision of the bankruptcy judge to the appellate court pursuant to § 158(d).

The holding of the court below squares with the strong policy of discouraging piecemeal interlocutory review and is not a denial of appeals altogether. Interlocutory appeals are merely limited both to discretionary review under § 158(a) by the District Court of interlocutory orders of the bankruptcy judge and pursuant to § 1292, a Court of Appeals' review of interlocutory decisions where the interlocutory order originated in the District court. Thus, in either instance, interlocutory orders are subject to appellate review, demonstrating that this matter is not one of substantial interest, since the litigant is provided with an appellate remedy to rectify any improper situations.

III. THE COURT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT SQUARES WITH APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals for the Second Circuit has decided a federal question in a way that squares with applicable decisions of this Court. Petitioner's contentions that the Court of Appeals' decision repealed by implication §

1292 with regard to interlocutory decisions of bankruptcy courts appealed to the District Courts and that such an approach runs counter to two canons of statutory construction and to which it cites several cases are clearly inaccurate. The Court of Appeals' approach does not necessarily run counter to either of the policies of these canons of statutory interpretation.

All canons of construction are merely guidelines for the Court to observe in its examination into the language of the legislative history behind and the legislative intent for a particular statute *Rodzanower v. Touche Ross & Co.*, 426 U.S. 148, 164 (1976)(per dissenting opinion of Stevens, J.). Normally, two statutes capable of coexistence are each to be given effect, but only providing that their sense and purpose can be preserved. *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Moreover, narrower and more specific statutes are controlling over more general statutes unless the Court finds a clear and manifest Congressional intent to the contrary. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 402 U.S. 437, 445 (1985); *Busic v. United States*, 446 U.S. 398, 406 (1980); *Radzanower v.Touche Ross & Co.*, 426 U.S. at 153.

In the instant case, the Court of Appeals made an exhaustive examination into the language history and intent of both 28 U.S.C. §§

158 and 1292. In a well principled decision, the Court found that the legislative history clearly indicated that certain amendments to Title 28 including § 158 were made to clarify that with respect to certain determinations of bankruptcy cases, only appeals from District Courts to Courts of Appeals were affected and not appeals of Bankruptcy Courts to District Courts.

The Court found that § 1292(b) could not provide it with jurisdiction in the instant case as the analysis of § 158 revealed that Congress intended to narrow Courts of Appeals' jurisdictions over bankruptcy cases. Thus, unless § 158(d) provides the exclusive means of jurisdiction to review orders entered under § 158(a), then § 158 is superfluous and dead weight as Courts of Appeals already have jurisdiction over final decisions of the District Court pursuant to 28 U.S.C. § 1291. Since § 158(d) was found to be exclusive, there was similarly no jurisdiction under § 1292(b).

In short, for the narrow proviso of § 158(d) to be given any effect, the Court necessarily declined jurisdiction pursuant to the more general provisions of § 1292(b). Thus, its approach was not contrary to the rule that statutes capable of coexistence are whenever possible to each be given. A different result clearly would have ignored the sense and

purpose of § 158. Furthermore, while it is true that implicit repeals are disfavored, this is only another guideline for a court, albeit a strong one, in discerning legislative intent. Adherence to this canon of construction, like others, is not required under all circumstances especially as in the case at bar where the intentions of the legislative are clear and manifest. Simply put, it is not a hard and fast rule to be rigidly applied to every situation.

The Court of Appeals made a long and searching examination of the legislative history that composed almost one-half of its opinion before making its determination. This is contrary to the Seventh Circuit's cursory conclusion, in *In re Moens*, 800 F. 2d 173, 177 (7th Cir. 1986), the case cited to by the petitioner. While that Court reached a different conclusion, it failed to demonstrate or even document any examination into the legislative history of §§ 158 and 1292. Instead it merely made the bare statement that the legislative history and the text of § 158 did not indicate that § 158 was its sole source of jurisdiction and thus may be wrongly decided. It cannot support petitioners contention that Congress did not intend the result reached below.

History, precedent and principal leave no ground for doubt that the Second Circuit Court of Appeals properly interpreted § 158(d) in a

manner consistent with canons of statutory construction and with applicable decisions of this Court.

IV. WHILE THERE MAY BE SOME CONFUSION, FEW COURTS HAVE DECIDED THAT 28 U.S.C. §158(D) GRANTS JURISDICTION TO COURTS OF APPEALS OF INTERLOCUTORY ORDERS OF THE BANKRUPTCY COURTS, AS OPPOSED TO FINAL ORDERS THEREOF.

While there may be some minor disagreement on the subject, the clear weight of authority is that § 158 precludes Court of Appeals' review of interlocutory orders of the bankruptcy court.

While it is true, as petitioner correctly points out, that the Ninth Circuit once held that 28 U.S.C. § 158(d) precluded application of § 1292(b) with regard to all bankruptcy appeals, the Ninth Circuit has retreated from its earlier position. In *In re Benny*, 791 F.2d 712, 717-20 (9th Cir. 1986) the Ninth Circuit concluded that only § 158(d) vested the court with jurisdiction over an appeal taken pursuant to § 158(a) from the bankruptcy court to the District Court. As this holding is the same as the one reached below in the instant case, there is no conflict between the Second and Ninth Circuits on this issue.

The Petitioner also suggest there exists a series of cases which contradict the Second Circuit decision by holding that § 1292(b) is available for all bankruptcy appeals. While there may be some surface attraction to the Petitioner's claim, however, this contention misses the mark. The issue addressed by the Second Circuit is whether *interlocutory* orders, judgments and decisions of bankruptcy courts are subject to review of Courts of Appeals either pursuant to § 1292 or § 158. With all but a few exceptions, the decisions cited by the petitioner may be distinguished by the opinions' failure to address this particular issue, by the language limiting jurisdiction to final resolutions and judgment of the bankruptcy courts or by mere dicta which is not controlling. *See Teton Exploration Drilling v. Bokum Resources*, 818 F.2d 1521, 1524 (10th Cir. 1987)(finding jurisdiction over District Court's order confirming final judgment of bankruptcy court); *In re Salem Mortgage Co.*, 783 F.2d 626, 632 (6th Cir. 1986)(under either 28 U.S.C. § 158 or 1291, a final decision is required for appellate jurisdiction.)

The petitioner's reliance on *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (Third Circuit 1983) is also misplaced. In dicta, the court merely suggested reservations over whether the Court of Appeals had jurisdiction over interlocutory orders of the

bankruptcy court, and that it would require "critical analysis" before it decided the issue. *Id.* at 200 n. 2. Further, the court clearly indicated that its holding made it unnecessary to consider this issue. *Id.* at 200. Thus, its later decision in *In re Brown*, 803 F.2d 120 (3rd Cir. 1986) is merely the logical extension of this case as it considered § 158, and reasoned that the finality requirement prevented it from entertaining jurisdiction over interlocutory orders of the bankruptcy court. *Id.* at 120-121. Of course, the decision in *Brown* also clearly supports the decision of the court below and merely demonstrates the development of the issue in the Third Circuit.

V. THE OPINION OF THE COURT BELOW HAS AUTHORITATIVELY DECIDED THE ISSUE IN THE SECOND CIRCUIT.

It is true that prior to this case at bar, there were several decisions of the Second Circuit on the issue which could not be harmonized. However, the court below recognized the inconsistencies and addressed the issue *de novo* and then circulated its opinion to all the other active judges on the Second Circuit Court of Appeals. As no active judge sought *en banc* consideration on the issue despite the prior inconsistent precedents, the decision reached below is tantamount to an *en banc*

consideration. Thus, in the Second Circuit, the issue has now been authoritatively and finally resolved.

As petitioner contends, the Fifth Circuit has demonstrated some inconsistencies over whether § 158 supercedes § 1291 with regard to orders from final judgments. However, there is no inconsistency in this Circuit with regard to appeals of interlocutory appeals of bankruptcy judges taken pursuant to § 158(d). In *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985), the Court of Appeals for the Fifth Circuit concluded that it lacked appellant jurisdiction over a writ of madamus pursuant to § 158(d), because it was not a final appealable order. In *In re Topco, Inc.*, 894 F.2d 727, 736 (Fifth Circuit 1990) the court found appellant jurisdiction over a final judgment of the bankruptcy court granted by the District Court. Even though there was a slight retreat with regard to the Court's basis of jurisdiction inasmuch as it held § 1291 as an alternate ground of jurisdiction for the final order of the district, nevertheless, it did not address review of *interlocutory* appeals from bankruptcy judges. *See In re Topco*, 894 F.2d at 737 n.14; *See also Matter of Texas Research, Inc.*, 862 F. 2d 1161, 1162 (5th Circuit 1989) (Court of Appeals has jurisdiction over final judgment of bankruptcy judge entered by District Court).

Thus, it is clear that with respect to interlocutory orders, the Fifth Circuit has not demonstrated any inconsistent precedents. Further, as indicated above, the Third Circuit's precedents are not in conflict with each other and can be reconciled. In short, respondent's contentions are misplaced inasmuch as the circuits are not materially internally inconsistent with regard to their lack of jurisdiction to review interlocutory decisions of bankruptcy judges, though a different result may be the case with regard to their basis of jurisdiction for appellate review of final judgments of bankruptcy judges.

CONCLUSION

For the foregoing reasons, it is respectfully requested that Petitioner's request for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit be denied.

Respectfully submitted,

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AUGUST 15, 1991

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1990

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,
Respondent,

v.

THE CONNECTICUT NATIONAL BANK,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

APPENDIX TABLE OF CONTENTS

FEDERAL STATUTE **PAGE(S)**

28 U.S.C. § 158 (1988)

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under § 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under section (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under § 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The Courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(Added Pub.L. 98-353, Title I, § 104(a), July 10, 1984, 98 Stat. 341, and amended Pub.L. 101-650, Title III, § 305, Dec. 1, 1990, 104 Stat. 5105)

28 U.S.C. § 1291 (1988)

§ 1291 Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

28 U.S.C. § 1292 (1988)

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof,

granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

[(4) Repealed. Pub.L. 97-164, Title I, § 125 (a)(3), Apr. 2, 1982, 96 Stat. 36]

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken

from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction -

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under § 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of § 256 (b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground

for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals fro the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Claims Court under section 1631 of this title.

(B) When a motion to transfer an action to the Claims Court is filed in a district court, no further proceedings shall be taken in the district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonable necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Claims Court pursuant to the motion shall be carried out.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 125, 96 Stat. 36; Nov. 8, 1984, Pub.L. 98-

620, Title IV, § 412, 98 Stat. 3363; Nov. 19, 1988, Pub.L. 100-702, Title V, § 501, 102 Stat. 4652.)

(3)

No. 90-1791

In The

Supreme Court Of The United States

October Term, 1990

THE CONNECTICUT NATIONAL BANK,

Petitioner,

v.

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (continued)

Cases **Page(s)**

TABLE OF AUTHORITIES (continued)

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. ARGUMENT

In responding to CNB's petition for a writ of certiorari, the Trustee erroneously contends that there are no special reasons for this Court to review the decision rendered below by the Court of Appeals for the Second Circuit. To support his claim, the Trustee argues, first, that there is only minimal confusion amounting to minor disagreement among the courts of appeals on the issue of the appealability of interlocutory orders in bankruptcy matters; second, that there is no disharmony between competing precedents within the Second Circuit; third, that the issue is unimportant; fourth, that the decision below was well-reasoned; and fifth, that the decision is in harmony with applicable decisions of the Supreme Court.

In arguing minor "confusion" among the courts of appeals, the Trustee apparently ignores the recent conclusion of the Fourth Circuit that the courts of appeals "are badly split" on the issue of the applicability of § 1292(b) to appeals of interlocutory bankruptcy orders. *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 751-52 (4th Cir. 1990). The Trustee also apparently ignores the conclusion reached by the court below which noted that "[t]he disarray of our decisions is matched by similar disagreements among the circuits, which are amply described in *Capitol Credit* . . . . " *Germain v. The Connecticut National Bank*, 926 F.2d 191, 194 (2d Cir. 1991). *See In re Benny*, 791 F.2d 712, 717 (9th Cir. 1986) (noting similar disarray in the precedents of the Ninth Circuit). Since the Fourth Circuit's decision in the *Capitol Credit* case in 1990, this well-recognized split has only deepened.[1]

---

[1] For example, in addition to the precedents discussed in *Capitol Credit*, the Second Circuit has rendered its opinion in the case below in conflict with *In re Goodman*, 873 F.2d 598, 602 (2d Cir. 1989) (finding an order of a bankruptcy judge appealable pursuant to § 1292(a)(1)); the Seventh Circuit has followed its prior precedents permitting interlocutory appeals of

(continued)

The Second Circuit's holding that it lacked jurisdiction under § 1292(b) to hear interlocutory appeals of matters originating in the bankruptcy courts is bottomed on its determination that § 158(d) is an exclusive jurisdictional grant. *Germain*, 926 F.2d at 191 & 194. *Accord LTV Corp. v. Farragher (In re Chateaugay Corp.)*, 838 F.2d 59, 62-63 (2d Cir. 1988) (holding § 158(d) to be exclusive). In attempting to characterize the current nationwide split of authority on the exclusivity of § 158(d) as relatively minor, the Trustee attempts to limit the focus of attention to those particular cases where a court of appeals has specifically accepted or denied a petition for review under § 1292(b). *Respondent's Brief*, at 12. Thus, the Trustee seeks to exclude from consideration those cases that deal mainly with whether § 158(d) precludes application of other jurisdictional provisions, such as §§ 1292(a) and 1291. A clear split of authority does exist on the narrow issue of whether § 158(d) precludes § 1292(b) in the limited sense suggested by the Trustee. *Compare, e.g. Germain*, 926 F.2d at 197 (rejecting applicability of § 1292(b)); *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d at 754 (rejecting applicability of § 1292(b)), with *In re Jartran, Inc.*, 886 F.2d 859, 864-65 (7th Cir. 1989) (applying § 1292(b)); *In re Moens*, 800 F.2d 173, 176-77 (7th Cir. 1986) (applying § 1292 (b)). However, consideration of these precedents alone is overly narrow. The relevant issue of the exclusivity of § 158(d) for jurisdictional purposes is the same regardless of whether a specific court is construing § 158(d) in conjunction with § 1292(b), § 1292(a) or § 1291 – either § 158(d) precludes application of other jurisdictional provisions or it does not. Thus, in concluding that § 158(d) was exclusive, the court below stated with regard to §§ 1292(b) and 1292(a) that "we perceive no principled grounds for distinguishing between these subsections for purposes of determining our appellate jurisdiction." *Germain*, 926 F.2d at 193. Other courts have treated the issue

[1] *(continued)*
bankruptcy orders in bankruptcy cases, *Levit v. Ingersoll Rand Financial Corp. (In re V.N. Deprizio Construction Co.)* 874 F.2d 1186, 1188 (7th Cir. 1989); and the Tenth Circuit has rejected the approach taken by the Seventh Circuit, *In re Kaiser Steel Corp.*, 911 F.2d 380, 386 (10th Cir. 1990).

of exclusivity in the same collective manner. *See, e.g., In re Teleport Oil Co.*, 759 F.2d 1376, 1378 (9th Cir. 1985) (after finding § 158 to be exclusive, the court stated "[w]e conclude that the interlocutory appeal provisions of § 1292, like the final appeal provisions of § 1291, are inapplicable to bankruptcy proceedings"); *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (concluding that § 158 "clearly supersedes 28 U.S.C. § 1291 . . . and would inferentially appear to supersede § 1292 as well"). Accordingly, in discussing the disagreements among the circuits, CNB has included a fuller sampling of the conflicting decisions that treat the exclusivity of § 158(d). *See Petitioner's Petition for a Writ of Certiorari*, at 5-6 (discussing the three schools of thought on the exclusivity of § 158(d)).

Viewed in full perspective, the marked disagreements over the exclusivity of § 158(d) is an example of confusion and conflict of the worse kind. The present unsatisfactory state of affairs is perhaps best illustrated by the amount of disagreement among various panels within the same circuits. Not only do different panels disagree on their jurisdiction over bankruptcy orders under § 1292(b) in conjunction with § 158(d), but they also disagree on the applicability of §§ 1292(a) and 1291.[2] In its own candid assessment, the court below acknowledged that appellate precedents within the Second Circuit "are in disarray on the jurisdictional question" and recited the con-

[2] *Compare, e.g., In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (holding § 158(d) "clearly supersedes 28 U.S.C. § 1291"), *with In re Texas Research, Inc.*, 862 F.2d 1161, 1162 (5th Cir. 1989) (finding jurisdiction over bankruptcy court order pursuant to § 1291); *Matter of Topco, Inc.*, 894 F.2d 727, 737 (5th Cir. 1990) (concluding "[b]oth Section 1291 and Section 158 govern appeals to courts of appeals from district court decisions when district courts sit as bankruptcy appellate courts"). *Compare, e.g., Germain*, 926 F.2d at 197 (holding § 158(d) to be exclusive), *with In re Goodman*, 873 F.2d 598, 602 (2d Cir. 1989) (finding an order of a bankruptcy judge appealable pursuant to § 1292(a)(1)). *Compare Teton Exploration Drilling, Inc. v. Bokum Resources Corp.*, 818 F.2d 1521, 1524 n.2 (10th Cir. 1987) ("we perceive no indication that Congress intended § 158(d) to act as a limitation on the general jurisdiction of appellate courts under § 1291"), *with In re Kaiser Steel Corp.*, 911 F.2d at 386 (10th Cir. 1990) ("[w] find that Congress must have intended section 158(d) to be the exclusive basis of appellate jurisdiction . . .").

flicts in some detail in the text of its opinion. *Germain*, 926 F.2d at 193-94. Notwithstanding the Trustee's downplaying of the disagreements among and within the circuits, there is virtually no hope that the sharp conflicts of authority can be resolved judicially without the intervention of this Court.

Although the Trustee denies the importance of the issue presented for review, its true significance cannot be seriously in doubt. Not only does the decision of the Second Circuit impact on the jurisdiction of the courts of appeals, but also on the jurisdiction of this Court.[3] Furthermore, this Court thought a similar issue significant enough to warrant certiorari in *Tidewater Oil Co. v. United States, cert. granted*, 405 U.S. 986 (1972), to review whether § 2 of the Expediting Act, 15 U.S.C. § 29, precluded appellate jurisdiction over interlocutory appeals under § 1292(b). In contrast to a decision of the Seventh Circuit,[4] the Court of Appeals for the Ninth Circuit in the *Tidewater* matter found that § 29 barred application of § 1292(b). In discussing the importance of the issue, this Court explained "[b]ecause this decision raises an important question of federal appellate jurisdiction and because a conflict among the circuits subsequently developed on this question, we granted certiorari." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 153 (1972).

Although the Trustee claims that the opinion below is well-reasoned and supported, a conclusion contested by CNB, this argument bears more on whether the decision should be upheld or overturned than on whether the issue presented is significant or important enough for this Court to decide. In

[3] As noted in the decision below, if § 158(d) "precludes court of appeals review of interlocutory decisions of bankruptcy courts, including injunctions, Supreme Court review also will be barred." *Germain*, 926 F.2d at 196. *See also Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 200 n.7 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983) (noting that a finding that § 158(d) excludes § 1292 would "bar all court of appeals and Supreme Court review of interlocutory orders in bankruptcy cases . . .").

[4] *Fisons, Ltd. v. United States*, 458 F.2d 1241, 1244-48 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972).

any event, given the importance of the issue and the sharp disagreements among and within the courts of appeals, the matter merits this Court's review and resolution.

Contrary to the Trustee's assertions, the decision below was decided in a manner at odds with applicable precedents of this Court. A plain, literal reading of § 1292(b) can only result in the conclusion that it is available to appeals of interlocutory district court orders reviewing bankruptcy court orders because the statutory provision is applicable on its face and because nothing in the text of either § 158(d) or § 1292(b) provides that § 158(d) is exclusive. As stated by this Court, "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). In this matter, there is nothing in the legislative history that demonstrates that application of § 1292(b) would contradict congressional intent with regard to § 158(d). Accordingly, literal application of both statutes is required. *Id.*

Although the decision below does trace the legislative history of § 158(d) through its predecessor, 28 U.S.C. § 1293, the most that can be concluded from the court's analysis is that it remains unknown whether Congress intended § 158(d) to be exclusive. *See Germain*, 926 F.2d at 194-96 (reviewing legislative history of § 1293). Both the Seventh and Third Circuits have stated that the legislative history is silent on the issue of Congress' intent with regard to any claim of exclusivity. *See in re Moens*, 800 F.2d 173, 177 (7th Cir. 1986) (stating "there is nothing in [§ 158(d)] or its legislative history which indicates that Congress intended to foreclose . . . review [under § 1292(b)]") *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 200 n.7 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983) (stating "for all practical purposes there is no legislative history for [§ 1293, the predecessor to § 158(d)]"). *See also Teton Exploration Drilling, Inc. v. Bokum Resources Corp.*, 818 F.2d 1521, 1524 n.2 (10th Cir. 1987) ("we perceive no indication that Congress intended § 158(d) to act as a limitation on the gen-

eral jurisdiction of appellate courts under § 1291").

Nonetheless, the court below reached the conclusion that § 158(d) implicitly "repeals" § 1292 as "part of a far greater explicit repeal," presumably of § 1291. *Germain*, 926 F.2d at 197. The court acknowledged that such an interpretation may well violate "the canon of construction disfavoring repeals by implication." *Id.*, at 197. Indeed, in the absence of a "clear and manifest" legislative intent to repeal § 1292, which intent is lacking here, the court's approach would appear to squarely contradict the rule prohibiting implicit repeals. *See, e.g., Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (requiring a "clear and manifest" legislative intent to repeal to support an implicit repeal); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (requiring a clear congressional intent to repeal); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (requiring a clear and manifest intent to support implicit repeal). Nevertheless, the court found the concept of concurrent applicability more troublesome than the prospect of an implicit repeal. *Germain*, 926 F.2d at 197. Other courts, however, have had little difficulty concluding that the several jurisdictional provisions are capable of concurrent application. *See, e.g., In re Pacific Express, Inc.*, 780 F.2d 1482, 1484 (9th Cir. 1986) (finding jurisdiction of bankruptcy court appeal under both § 158 and § 1291); *In re Salem Mortgage Co.*, 783 F.2d 626, 632 (6th Cir. 1986) (treating §§ 158 and 1291 as alternative jurisdictional provisions); *Teton Exploration Drilling, Inc.*, 818 F.2d at 1524 n.2 (10th Cir. 1987) (finding jurisdiction of appeal from bankruptcy judge under § 1291).

Furthermore, the court below included § 1292 within the sweep of its implicit repeal analysis without elaborating why its concept of a "far greater explicit repeal" of § 1291 necessitated repeal of § 1292. *Germain*, 926 F.2d at 197. Although the court suggests that concurrent application of §§ 158(d) and 1291 would necessarily render one of the provisions superfluous in the context of bankruptcy appeals, *Id.*, the same cannot be said for concurrent application of §§ 158(d) and 1292 since the former treats final orders and the later interlocutory ones. In the absence of an adequate explanation, the court's decision contradicts the rule that statutes capable of coexistence are to each be given effect wherever possible. *See Radzanower v. Touche Ross & Co.*, 426 U.S. at 155; *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"); *United States v. Borden Co.*, 308 U.S. at 198 ("[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible").

The decision below also raises more difficult questions of appellate jurisdiction than it attempts to resolve. To begin with, the court's theory of the implied exclusivity of § 158(d) raises a serious concern over the scope of § 1291. Like § 1291, § 158(d) expressly provides only for review in the courts of appeals of final decisions of the district courts. Neither provision expressly references § 1292(b) nor does either expressly exclude it. If § 158(d) can be said to preclude application of § 1292(b) because § 158(d) only permits appeals of final orders, then, logically, § 1291 also precludes application of § 1292(b) since it also only provides for review of final orders. If § 158(d) is somehow exclusive in a manner that § 1291 is not, the court below does not articulate why in a manner consistent with well-recognized principles of statutory construction.[5] Furthermore, if § 158(d) is genuinely exclusive, then it would also arguably preclude appellate review on writs of mandamus.[6] Again, if the court's concept of exclusivity does not go quite

[5] No significance can be drawn from the codification of § 1291 proximate to 1292 since § 158(d) is the successor to § 1293, a companion to these provisions. The court below acknowledges that § 158(d) differs "in language but not in substance" with § 1293. *Germain*, 926 F.2d at 194.

[6] Arguably, if § 158(d) is as exclusive as some courts adamantly hold, then § 158(d) would appear to preclude review under the All Writs Act, 28 U.S.C. § 1651, including petitions for writs of mandamus. *Compare In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (after concluding that § 158(d) excluded

(continued)

so far, there is no limiting principle suggested in the opinion below.

II. CONCLUSION

For the foregoing reasons, the Trustee's arguments should be rejected, and it is respectfully requested that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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September 19, 1991

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[6] *(continued)*
§ 1292, court granted writ of mandamus without treating question of whether exclusivity of § 158(d) extended to the All Writs Act), *with In re Kaiser Steel Corp.*, 911 F.2d at 386 (concluding that "the appellate nature of mandamus subjects it to the same limitations under § 158(d) as exist on our review of a district court's appellate decision under section 158(a)").

No. 90-1791

In The

Supreme Court Of The United States

October Term, 1991

THE CONNECTICUT NATIONAL BANK,

Petitioner,

v.

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF CONNECTICUT

O'SULLIVAN'S FUEL OIL CO., INC. V. CONNECTICUT NATIONAL BANK,
ADVERSARY NO. 2-870078 (RLK)
(IN RE O'SULLIVAN'S FUEL OIL CO., INC.,
CASE NO. 2-84-00038 (RLK))

Date	*Description*	*No.*
7/15/87	Petition for Removal.	87-0078
8/21/87	Answer of the Defendant.	0078-F
8/24/87	Request For Trial By Jury.	
10/02/87	Motion to Withdraw Referral to Bankruptcy Court by Plaintiff.	0078-r
11/24/87	Amended Complaint.	
11/02/88	Defendant's Motion to Strike Jury Demand.	78tt
9/06/89	Judge's Ruling on Defendant's Motion to Strike Plaintiff's Request for Trial By Jury.	78-aaaa
9/19/89	NOTICE OF APPEAL filed on 9/15/88 by Eric Brunstad, Esq., Atty. for Ct. National Bank, on Order Denying Defendant's Motion to Strike Plaintiff's Request for Trial by Jury. cc: Thomas Germain, Esq. & U.S. Trustee's Office.	78 – cccc

Date	*Description*	*No.*
9/19/89	Appellant's Motion for Leave to Appeal to the United States District Court Pursuant to 28 U.S.C. Section 158(a) dated 9/15/89.	78-dddd
9/19/89	Notice of Appeal by Leave to District Court dated 9/15/89.	78-eeee

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

O'SULLIVAN'S FUEL OIL CO., INC. V.
CONNECTICUT NATIONAL BANK,
DOCKET NO. H 87-63 (PCD)

Date	*Description*	*No.*
2/02/88	Ruling on Motion to Revoke Referral to US Bankruptcy Judge by Judge Dorsey on 2/17/88.	0078-v
6/23/88	Ruling on Motion to Dismiss.	
6/30/88	Affirmance of Judge Krechevsky's Decision Requested by District Court re: Whether Pending Adversary Proceedings is a Core or Non-Core Proceeding. Recommended to district court that adv. proceeding be determined to be a core proceeding.	0078-11

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

O'SULLIVAN'S FUEL OIL CO., INC. V.
CONNECTICUT NATIONAL BANK,
DOCKET NO. H89-663 (PCD)

Date	*Description*	*No.*
11/14/89	RULING on Motion for Leave to Appeal: . . . leave to appeal will be granted . . . SO ORD. PCD, J. cc: Cnsl (mjqc)	8
3/22/90	RULING on Bankruptcy Appeal: CNB'S Appeal of the denial of its motion to strike is dismissed. Judge Krechevsky's ruling that trustee is entitled to jury trial in the adversary proceeding in issue is affirmed. Remanded to bankruptcy court for consideration of propriety of conducting such jury trial in bankruptcy court. SO ORD. PCD, J. cc: Cnsl (mjqc)	16
4/02/90	MOTION to Amend Order: to add: The Order of the Court involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation, fld by CNB (mjqc)	17

Date	*Description*	*No.*
5/16/90	MOT #17: Granted & for reasons set forth in court's ruling on mot for leave to appeal. SO. ORD. PCD, J. cc: cnsl (mjqc)	
6/15/90	NOTICE OF APPEAL fld by deft from the Order and ruling ent 3/22/90. cc of NOA w/cc of dckt entries mld counsel, USCA w/cc of fee receipt. CAMP pkg furnished appellant counsel. cc of NOA furnished PCD (LAI)	19

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC. V. THE CONNECTICUT NATIONAL BANK,
CASE NO. 90-8054

Date	*Description*	*No.*
7/17/90	Movant CONNECTICUT NATIONAL BANK'S Motion for Permission To Appeal Pursuant to 1292 (b) filed orig. & 3 cc to cal.	1
12/14/90	Movant CONN. NAT. BANK'S correspondence dated 12/10/90 regarding request for consolidation of this appeal (90-8054) and related appeals filed in (90-5044) received (1 cc SAB, 3 cc calendaring) (cc: RKW, JDM, JMW, JR.)	2
2/15/91	Published signed opinion filed before RKW, JDM, & JMW, JR.	3
2/15/91	Judgment filed before RKW, JDM, & JMW, JR. (By EJG)	4

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In The Matter Of:

O'SULLIVAN'S FUEL OIL CO., INC., Debtor — In Bankruptcy Case No. 2-84-00038

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC., Plaintiff

v.

CONNECTICUT NATIONAL BANK, Defendant — Adversary Proceeding No. 2-87-0078

ORDER

The defendant's motion to strike plaintiff's request for trial by jury having been heard, and the court having filed a Memorandum of Decision containing Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendant's motion be denied.

Dated at Hartford, Connecticut, this 6th day of September, 1989.

/s/ ROBERT L. KRECHEVSKY
ROBERT L. KRECHEVSKY
CHIEF BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

O'SULLIVAN'S FUEL OIL CO., INC., :

– v. – : Civil No. H-89-663 (PCD)

THE CONNECTICUT NATIONAL BANK :

RULING ON MOTION FOR LEAVE TO APPEAL

On September 6, 1989, Judge Krechevsky, Chief Bankruptcy Judge, denied defendant's motion to strike the trustee's request for trial by jury in an adversary proceeding and, since both parties agreed that the bankruptcy court had no authority to conduct a jury trial, he directed the parties to take appropriate steps to remove the proceeding from the bankruptcy court. On September 15, 1989, defendant filed a notice of appeal, Bankruptcy Rule 8001(a), and a notice of appeal by leave, Rule 8001(b). Defendant contends that Judge Krechevsky's ruling is a final judgment within the meaning of 28 U.S.C. § 158(a) and that it is entitled to appeal as a right. Alternatively, defendant seeks leave to appeal from an interlocutory order.

DISCUSSION

A. Appeal as of Right

Defendant contends that the ruling in issue determined not only the jury trial issue but also the jurisdictional issue of whether or not the bankruptcy court can hear the matter. Thus, defendant asserts that the proceeding has terminated with respect to the bankruptcy court and the ruling should be construed as a final order for the purposes of appeal.

Section 158(a), 28 U.S.C., provides that the "district courts . . . shall have jurisdiction to hear appeals from final judgments, orders, and decrees . . . of bankruptcy judges." A final judgment is generally "'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *In re American Mariner Indus., Inc.*, 734 F.2d 426, 428 (9th Cir. 1984), quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945). While the ruling in issue would not be final under the standards of finality applied in the typical civil case, it has been recognized that the finality requirement should be "less rigidly applied in bankruptcy than in ordinary civil litigation." *In re Johns-Manville Corp.*, 824 F.2d 176, 179 (2d Cir. 1987). This is due to the unique characteristics of bankruptcy cases which are frequently protracted proceedings involving numerous parties. *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99, 104 (3d Cir. 1988). A decision in a bankruptcy case is considered final "when it wraps up a piece of litigation that would have been a stand-alone suit outside of bankruptcy law." *In re Kilgus*, 811 F.2d 1112, 1116 (7th Cir. 1987). Accordingly, courts have held that an order finally disposing of an adversary proceeding which is sufficiently discrete and separable from the rest of the bankruptcy is appealable as a final order despite the fact that the remainder of the bankruptcy proceeding remains pending. *See, e.g., In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1396 (5th Cir. 1987) (each adversary proceeding should be considered a separate judicial unit for purposes of determining finality).

Defendant contends that were this not a bankruptcy case, Judge Krechevsky's decision that he lacked jurisdiction to hear the matter would have resulted in dismissal of the action. Thus, it argues that the decision should be considered final since there is nothing left for the bankruptcy court to do regarding this adversary proceeding. However, the adversary proceeding in issue has not been finally resolved. The ruling would not be considered a final judgment in a stand-alone dispute outside of the bankruptcy context. *See In re Xonics, Inc.*, 813 F.2d 127, 129 (7th Cir. 1987). The denial of defendant's motion to strike the trustee's request for a jury trial did not

purport to resolve the merits of the adversary proceeding in question, but merely determined the forum and factfinder. Judge Krechevsky's ruling only determined that the trustee has a right to a jury trial in an adversary proceeding to recover monetary damages for torts and contract violations allegedly committed by defendant post-petition. He ordered the parties to remove the action from the bankruptcy court based on their agreement that the bankruptcy court has no authority to conduct a jury trial. However, he did note that the issue was one "expressly left undecided" by *Granfinanciera v. Nordberg*, 492 U.S. ___ (1989). Although the ruling results in a change of forum, it does not represent a final order as to the resolution of the adversary proceeding. Accordingly, the denial of defendant's motion to strike the trustee's jury demand is found to be interlocutory in nature. *Cf. In re Stiles*, 29 Bankr. 389 (M.D. Tenn. 1982) (denial of a jury demand by a bankruptcy judge is a non-appealable interlocutory order).

B. Appeal by Leave of Court

An appeal from an interlocutory order may be taken to a district court under 28 U.S.C. § 158(a), but only "with leave of the court." Leave to appeal is liberally granted where it will further the expeditious resolution of the case. *See, e.g., In re Johns-Manville Corp.*, 45 Bankr. 833, 835 (S.D.N.Y. 1984). Leave to appeal interlocutory orders of the bankruptcy court are considered under the standard found in 28 U.S.C. § 1292(b), which deals with appeals of interlocutory orders from district courts to courts of appeals. *In re Beker Indus. Corp.*, 89 Bankr. 336 (S.D.N.Y. 1988). Under this standard, leave should be granted if there are controlling questions of law as to which there are substantial grounds for difference of opinion and if an immediate appeal may materially advance the ultimate termination of the litigation. *Id.*

The trustee does not dispute that the issue involves a controlling question of law on which there exists a substantial ground for difference of opinion but rather argues that defendant cannot establish that an immediate appeal will materially advance the ultimate termination of the litigation. He contends that the ruling related only to a procedural matter, did not affect the issues to be determined by the trier of fact, nor have a substantial impact on the length of the trial itself. Defendant, on the other hand, argues that a determination that the trustee lacks a right to a jury trial would bring the matter back before Judge Krechevsky for expeditious resolution. In short, defendant contends that a bench trial in the bankruptcy court would be considerably swifter than a jury trial in some other forum after the lengthy process of removal.

Considering all the circumstances of this case, leave to appeal will be granted. Although limited to the issue of the trustee's right to a jury trial, the ruling has the effect of removing the matter from the bankruptcy forum. In view of the substantial potential for delay in removing the case from the bankruptcy court to conduct a jury trial in an as yet undetermined forum, an immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Further, an expedited briefing schedule such as that provided in Bankruptcy Rule 8009(a) would not result in significant delay should Judge Krechevsky's ruling be upheld. Accordingly, defendant's motion for leave to appeal is granted. The parties shall brief the matter as provided in Rule 8009(a) with the time periods commencing as of the date of this order.

SO ORDERED.

Dated at Hartford, Connecticut, this 14th day of November, 1989.

/s/ Peter C. Dorsey
Peter C. Dorsey
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE CONNECTICUT NATIONAL BANK,	
Defendant-Petitioner	Petition for Permission to Appeal
V.	
THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.	
Plaintiff-Respondent	May 25, 1990

PETITION FOR PERMISSION TO APPEAL

Pursuant to 28 U.S.C. § 1292(b) and Rule 5(a) F.R.App.P., The Connecticut National Bank ("CNB") hereby petitions the Court for permission to appeal the March 22, 1990 order and ruling of the Hon. Peter C. Dorsey, U.S. District Judge of the District of Connecticut (a copy of which order and ruling is attached hereto as "Appendix A"), which order was amended by the district court on May 16, 1990 to add the statement prescribed by § 1292(b) (a copy of which amendment is attached hereto as "Appendix B").

JURISDICTION

The Court may review the March 22, 1990 order and ruling of the district court pursuant to 28 U.S.C. § 1292(b). *In re Johns-Manville Corp.*, 824 F.2d 176, 180 (2d Cir. 1987).[1]

[1] Alternatively, this Court has jurisdiction over this matter under the collateral order doctrine. *See* notes 4 & 15, *infra*.

STATEMENT OF FACTS

1. On January 18, 1984, O'Sullivan's Fuel Oil Co., Inc. (the "debtor"), filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (hereinafter the "Bankruptcy Code").

2. CNB, a secured lender, filed a proof of claim in the case.

3. On July 30, 1986, the bankruptcy court ordered the conversion of the debtor's case from a Chapter 11 reorganization to a Chapter 7 liquidation.

4. Subsequent to the conversion, Thomas M. Germain, Esq. ("Trustee") was appointed Chapter 7 Trustee of the debtor's estate.

5. On May 29, 1987, the Trustee commenced suit against CNB in the Superior Court for the State of Connecticut alleging that, prior to and during the course of the bankruptcy proceedings, CNB committed various tortious acts against the debtor and the debtor's estate. The remaining counts of the Trustee's amended complaint allege (1) tortious interference; (2) coercion and duress; (3) fraudulent misrepresentation; (4) breach of an implied obligation to act in good faith and with fair dealing; and (5) violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a *et seq.*[2]

6. On July 15, 1987, the action was removed to the bankruptcy court.

7. On August 24, 1987, the Trustee filed in the bankruptcy court a demand for a jury trial on all of the issues raised in the amended complaint.

8. On November 2, 1988, CNB moved in the bankruptcy court to strike the Trustee's jury demand.

[2] The Trustee's RICO claim was dismissed by the district court.

9. On September 6, 1989, the bankruptcy court denied CNB's motion to strike.

10. On November 14, 1989, the district court granted CNB's request for leave to appeal the bankruptcy court's refusal to strike the Trustee's jury demand.

11. On March 22, 1990, the district court affirmed the bankruptcy court's order denying CNB's motion to strike.

STATEMENT OF QUESTION PRESENTED

Is the Chapter 7 bankruptcy Trustee entitled to claim the right to a jury trial with regard to the bankruptcy estate's postpetition claims against a secured creditor who has filed a claim against the estate?

STATEMENT OF SUBSTANTIAL BASIS FOR DIFFERENCE OF OPINION ON THE CONTROLLING QUESTION OF LAW

Section 1292(b) requires that the order appealed from involve a controlling question of law over which there is a substantial basis for difference of opinion.

A. The District Court's Determination Involves a Controlling Question of Law.

In this case, the district court ruled as a matter of law that the Trustee was entitled to a jury trial. The issue is a controlling question of law for the purposes of § 1292(b) because it resolves a determination that may importantly affect the conduct of the action, namely whether the action will be tried to a jury or before the bench, in an as yet undetermined forum.[3] *See In re Duplan*, 591 F.2d 139, 148 n. 11 (2d Cir. 1978) (a controlling question of law may include "a procedural determination that may importantly affect the conduct of an action"). *See also Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974) (to be a controlling question, the order need not "be determinative of any plaintiff's claims on the merits"). The issue is also a controlling question of law for the reason that the district court's determination, if erroneous, is reversible error.[4] *See Id.*, 496 F.2d at 755 (the standard of what constitutes a controlling question of law must be broad enough to encompass "every order which, if erroneous, would be reversible error on final appeal"). Moreover, the question presented is a controlling question since resolution of the issue may substantially accelerate the disposition of the litigation. *See In re Duplan*, 591 F.2d at 148 (quoting 9 Moore, Federal Practice ¶ 110.22[2] at 260 (1975) (" '[t]he courts have tended to make the 'controlling question' requirement one with the requirement that its determination 'may materially advance the ultimate termination of the litigation' ").[5]

[3] The district court remanded the case to the bankruptcy judge to determine the propriety of conducting a jury trial in the bankruptcy court. Appendix A, p. 10.

[4] Alternatively, if Judge Dorsey's ruling is erroneous but would not warrant reversal upon entry of a final judgment, then this Court has jurisdiction to review the order at this time under the collateral order doctrine. *See* note 15, *infra*.

[5] The potential of an immediate appeal to accelerate the ultimate termination of the litigation is more fully discussed in the last section of this Petition.

B. The Controlling Question of Law is One Over Which There Exists a Substantial Ground for Difference of Opinion.

In addition, Judge Dorsey's order involves a question over which there is substantial ground for difference of opinion since compelling authority suggests that the district court erred in reaching its conclusion. *See McDonnell Douglas Finance v. Pennsylvania Power & Light Co.*, 849 F.2d 761, 765 (2d Cir. 1988) (court cited to contrary decision by a district court in another jurisdiction to establish substantial basis for difference of opinion). As numerous courts have candidly stated, the entire area of jury trials in bankruptcy is the subject of sharp disagreement.[6] However, in spite of this general lack of consensus, certain relevant principles necessary to resolve the issues in this case are not the subject of dispute. It is clear that, upon filing a petition in bankruptcy, all of the debtor's property becomes property of the bankruptcy estate, including any and all causes of action. 11 U.S.C. § 541; *Sierra Switchboard Co. v. Westinghouse Electric Corp.*, 789 F.2d 705, 707 (9th Cir. 1986) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n. 9 (1983)). It is equally clear that the Chapter 7 Trustee, as the court appointed representative of the estate, replaces the debtor and acts on the estate's behalf. 11

[6] *Compare In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990) (holding that bankruptcy court could conduct jury trial), *with In re Missouri Bank of Kansas City, N.A.*, 1990 U.S. App. Lexis 6290 (8th Cir. 1990) (rejecting Second Circuit's approach and holding that bankruptcy court could not conduct jury trial). It is significant to note that both *Ben Cooper* and *Missouri Bank* rely on the Supreme Court's recent decision regarding jury trials in bankruptcy cases, *Granfinanciera v. Nordberg*, 109 S. Ct. 2782 (1989), a decision that the *Ben Cooper* opinion describes as "opaque." 896 F.2d at 1400. Another court has expressed its disappointment in *Granfinanciera* by stating that the Supreme Court has failed to "offer a scintilla of specific guidance" in many of the matters that it addressed. *In re Owensboro Distilling Co.*, 108 B.R. 572, 573 (Bankr. W.D. Ken. 1989). The *Owensboro* court likened the question of jury trials in bankruptcy to the cinematic monsters "Freddy Krueger" of *Nightmare on Elmstreet* and "Jason" of *Halloween. Id.*, 108 B.R. at 575 n. 1.

U.S.C. §§ 323 & 704. Because the Trustee is the representative of the estate, his power to pursue the estate's causes of action are purely derivative: it is axiomatic that the Trustee cannot pursue a cause of action that the estate does not possess. Thus, if the estate lacks a jury trial right, then so does the Trustee.

Resolution of whether the Trustee, as representative of the estate, may claim a right to a jury trial when pursuing the estate's causes of action turns, in part, on interpretation of several Supreme Court decisions: *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989) (hereinafter "*Granfinanciera*"); *Katchen v. Landy*, 382 U.S. 323 (1966), and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). In *Katchen v. Landy*, the Supreme Court held that a creditor who participates in the bankruptcy proceedings by filing a proof of claim loses any right to a jury trial when the estate turns around and sues him to recover a preferential payment.[7] *Katchen* is relevant to this case because it establishes the principal that a voluntary participant in a bankruptcy proceeding is not constitutionally entitled to a jury trial of either his claims against the estate or the estate's counterclaims against him.[8] Courts addressing the issue since *Granfinanciera* have universally applied this principal to creditors, holding that a creditor who submits itself to the equitable jurisdiction of the bankruptcy court by filing a proof of claim forfeits any jury trial right, even though the creditor would otherwise have possessed such a right. *See, e.g., In re Paris Industries Corporation*, 106 B.R. 344, 345 (Bankr. D. Me. 1989); *In re Wheeling-Pittsburgh Steel Corporation*, 108 B.R. 82, 85 (Bankr. W.D. Pa. 1989). *See also Bayless v. Crabtree*, 108 B.R.

[7] In holding that a creditor who did *not* file a proof of claim did not waive its jury trial right, *Granfinanciera* nonetheless reaffirmed the holding in *Katchen v. Landy*. *Granfinanciera*, 109 S. Ct. at 2799.

[8] The Supreme Court's analysis in *Schor, supra*, reinforces this principal. In *Schor*, the Court held that the customer of a commodities broker who presented his reparation claims for adjudication by an administrative law judge lost any right to have the broker's state law counterclaims decided by an article III tribunal.

299, 304 (W.D. Okla. 1989) (party consented to jurisdiction of bankruptcy court and thereby waived right to jury trial when party filed counterclaim against estate).

There is no logical reason why this principal should not also apply to the debtor in this case, and, by logical extension, to the estate and the Trustee. As one court has observed, "[t]he debtor, by the filing of his bankruptcy petition, voluntarily subjected himself to the equitable powers of the bankruptcy court and, assuming, *arguendo*, [that he had] the right to a jury trial in the first instance, he has also arguably waived that right." *In re Edwards*, 104 B.R. 890, 893 (Bankr. E.D. Tenn. 1989).[9] Since the estate is the debtor's legal successor, and since the Trustee represents the estate in pursuing its causes of action, the Trustee is likewise limited to adjudication by the bankruptcy judge without the aid of a jury.[10] It is not logical that CNB, having filed a proof of claim, is prohibited from claiming a jury trial by virtue of its participation in the bankruptcy proceedings while at the same time the Trustee's participation in the same proceedings does not yield the same result.[11]

[9] In *Edwards*, the debtor claimed a right to a jury trial on his state law fraud, negligence and breach of contract claims. *Id.* at 892. The court in *dicta* rejected the debtor's jury claim on the basis of its interpretation of *Granfinanciera*. *Edwards*, 104 B.R. at 893, n. 5. On the other hand, the district court in this case rejected CNB's identical argument which was also premised on *Granfinanciera*.

[10] Alternatively, it is also undeniable that the Trustee voluntarily participated in the bankruptcy proceedings. Accordingly, like the creditor that loses any jury trial right by its participation, the Trustee should likewise be bound by his involvement, particularly since, unlike the creditor, the Trustee is a statutory creation of the Bankruptcy Code and is not specifically vested with any statutory right to a jury trial.

[11] One court has framed the test applicable to determine whether a party has a right to a jury trial in bankruptcy as follows:

> A determination of the right to a jury trial requires the Court to consider the following factors: (1) custom with reference to the issue in dispute prior to the merger of law and equity in the
>
> *(continued)*

In addition, the issue of whether the trustee possesses the right to a jury trial remains unsettled in spite of the Second Circuit's recent decision in *In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990). *Ben Cooper* involved a jury demand by three defendants: the Insurance Company of the State of Pennsylvania, Kalvin-Miller International, Inc. and Kerwick & Curran, Inc., none of whom filed a proof of claim. The case did not involve a jury demand by the debtor-in-possession, Ben Cooper, Inc.[12] Thus, the issue of whether the estate or its representative lost any right to a jury trial was not before the *Ben Cooper* Court. Although the Court in *Ben Cooper* cites the *Schor* decision, it does not do so in a manner that resolves the issues presented in this case. Moreover, the *Ben Cooper* opinion does not discuss *Katchen v. Landy*. Accordingly, the question raised in this petition remains unsettled.

Lastly, resolution of the issue at this time is compelling since it makes no sense to have a jury trial in this case. The Trustee's allegations involve whether CNB conducted itself improperly in the proceedings in the bankruptcy court.[13] For

[11] (continued)

> federal system; (2) the nature of the remedy sought; and (3) *whether the defendant has submitted to the jurisdiction of this Court by filing a proof of claim.*

In re Fort Lauderdale Hotel Partners, Ltd., 103 B.R. 335, 336 (Bankr. S.D. Fla. 1989) (emphasis added). Essentially, the district court in this case erred in failing to properly analyze whether the debtor, estate and/or Trustee had submitted to the jurisdiction of the bankruptcy court, thereby foregoing any jury trial right.

[12] In a Chapter 11 proceeding, the debtor-in-possession serves as the representative of the estate unless a trustee is appointed. By virtue of 11 U.S.C. § 1107(a), the debtor-in-possession in a Chapter 11 case possesses virtually all the powers of a trustee and is his functional equivalent.

[13] Both the bankruptcy court and the district court determined that the Trustee's causes of action were postpetition, core claims over which the bankruptcy court had appropriate jurisdiction pursuant to 28 U.S.C. § 157. The Trustee's claims focus on CNB's alleged misconduct in its capacity

(continued)

example, one of the Trustee's allegations is that CNB improperly obtained the court order directing conversion of the debtor's case to a Chapter 7 liquidation. It is inconceivable that a jury may sit in judgment of this order. A Trustee who is unhappy with the outcome of a bankruptcy proceeding is not entitled to seek review by a jury over what went on in the bankruptcy court. *See In re Edwards*, 104 B.R. at 893 (citing *Granfinanciera*) (stating in *dicta* that a creditor or debtor who voluntarily submits to the equitable jurisdiction of the bankruptcy court waives right to a jury trial). Also, the Trustee's claims for damages against CNB are appropriately counterclaims to CNB's financial claims against the estate since the Trustee's claims arise out of the same financial relationship. Rule 13, F.R.Civ.P. *See In re Summit Ridge Apartments, Ltd.*, 104 B.R. 405, 407 n. 3 (Bankr. N.D. Ala. 1989) (debtor's claims of wrongdoing against secured creditor held to be counterclaims to creditor's proof of claim). Accordingly, the Trustee's claims are for the bankruptcy court to decide in the exercise of its equitable jurisdiction without a jury. *See Bayless v. Crabtree*, 108 B.R. at 305 (citing *Granfinanciera*, 109 S. Ct. at 2799 n. 14; *Katchen v. Landy*, 382 U.S. at 338) ("[a]lthough they may be legal and otherwise amenable to jury trial under the seventh amendment, contrary assertions of right by trustees or debtors are open to adjudication in equity by Bankruptcy Judges under their powers to afford complete relief as to the controversy at bar"). *See also Hughes-Bechtol, Inc.*, 107 B.R. 552, 556 (Bankr. S.D. Ohio 1989) (in addition to waiving jury trial claim by filing proof of claim, party "has otherwise created an equitable proceeding in which the bankruptcy court is authorized to determine all issues without a jury").

For these reasons, the district court decided the controlling question of law in a manner contrary to precedent. Accord-

[13] *(continued)*

as the postpetition finance entity for the debtor's estate during the debtor's reorganization efforts. CNB's postpetition financial relationship with the estate arose out of the postpetition financing order entered by the bankruptcy court.

ingly, the question presented in this petition is a controlling question of law over which there is a substantial basis for difference of opinion.

STATEMENT WHY AN IMMEDIATE APPEAL MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION

Section 1292(b) also requires that an immediate appeal of the issue may materially advance the ultimate termination of the litigation. An immediate appeal in this case may materially advance the ultimate termination of the litigation since a bench trial in the bankruptcy court would be substantially more efficient and far less time-consuming than a jury trial in the bankruptcy court, or in some other forum yet to be determined.[14] *See McDonnell Douglas Finance Corporation v. Pennsylvania Power & Light Company*, 849 F.2d 761, 765 (2d Cir. 1988) (noting that "immediate appeal at this juncture might well advance the ultimate termination of this dispute by putting the parties before the proper tribunal as soon as possible"). Furthermore, since the District Court has already reviewed the issues which are the subject of the planned appeal, it would be a manifest waste of time to cut the appellate process in half at this point, only to be resumed in full upon entry of a final adverse judgment at some later date. *See Ford Motor Credit Company v. S.E. Barnhart & Sons*, 664 F.2d 377, 380 (3d Cir. 1981) (stating that § 1292(b) "is designed to allow for early appeal of a legal ruling when resolution of

[14] The district court remanded the case to the bankruptcy judge to determine the propriety of conducting the jury trial in the bankruptcy court. Accordingly, where the case will be tried has yet to be determined. Obviously, there is great potential for delay if the case is transferred by the bankruptcy court for jury trial elsewhere. However, if this Court determines that the Trustee lacks a jury trial right, then the need for such a determination ig avoided and the trial may proceed expeditiously before the bankruptcy judge, serving the interests of judicial economy and preserving the limited resources of the bankruptcy estate which must ultimately bear the Trustee's litigation expenses.

the issue may provide more efficient disposition of the litigation"). Similarly, if the district court's determination is erroneous, it would be a manifest waste of time to conduct a jury trial in some as yet undetermined forum only to have to retry the case a second time after a later appeal. Alternatively, a later appeal may be unavailing since an adverse decision by a jury may be binding on CNB under principles of *res judicata* in spite of the fact that the case should have been tried to the court.[15] *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578-79 (1974) (quoting *Commissioner v. Sunnen*, 333 U.S. 591 597 (1948)) (stating that *res judicata* applied to bar relitigation absent some factor invalidating the judgment). Additionally, an appeal at this time would not itself unduly delay the proceedings since the issue to be decided is discrete, has been fully brief to the district court, and, accordingly, may be resolved on an expedited basis.

[15] Similarly, even if the district court's determination is erroneous, it arguably may not constitute "reversible error" following a jury trial. To warrant reversal after judgment, two conditions must be shown: error and injury. "A judgment will not be reversed where reversal would be of no benefit to the appellant because the same judgment would have to be entered on retrial . . . ." 5 Am. Jur. 2d § 948 at 375. Arguably, it may be impossible to demonstrate that a judge would make factual determinations any differently than the jury. Accordingly, unless the order is reviewed at this time, CNB may be left without any real opportunity to seek review at a later date.

However, if CNB is left without an effective appeal after final judgment, then this Court possesses jurisdiction at this time to review Judge Dorsey's decision under the collateral order doctrine. To be reviewable as an interlocutory collateral order, a matter must (1) conclusively determine a disputed question; (2) resolve an important question completely separable from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The disputed question resolved by the district court was whether the Trustee is entitled to a jury trial. This issue is separable from the merits in that it does not decide the merits but only determines who the factfinder will be. The matter is important since it involves interpretation of the Seventh Amendment. For these reasons, the Court may possess jurisdiction on this alternative basis.

Finally, consideration of general principles of bankruptcy procedure also suggests that an appeal should be taken at this time. Rule 9015 of the Rules of Bankruptcy Procedure formerly provided the procedure for jury trials in bankruptcy cases. The rule was abrogated as of March 30, 1987 . The advisory committee states that "[i]n the event the courts of appeals or the Supreme Court define a right to a jury trial in any bankruptcy matters, a local rule in substantially the form of Rule 9015 can be adopted pending amendment of these rules." *See In re Ben Cooper*, 896 F.2d at 1403 (citing this provision). Whether or not a trustee may claim a jury trial in a bankruptcy case may bear upon the procedural rule that may be crafted to implement that right. Accordingly, an appeal at this time is provident.

Since an appeal at this time may materially advance the ultimate termination of the litigation and would likely avoid needless expense and duplication of effort at a later date, and would also serve other important interests, CNB's petition should be granted.

PETITIONER,
THE CONNECTICUT
NATIONAL BANK

By /s/ Eric Brunstad, Esq.

Eric Brunstad, Esq.
Janet C. Hall, Esq.
Robinson & Cole
One Commercial Plaza
Hartford, CT 06103
(203) 275-8204

CERTIFICATION

This is to certify on this 25th day of May, 1990, two copies of the Petition for Permission to Appeal and the appendices attached thereto, the Affidavit of G. Eric Brunstad, the Notice of Motion, and the Notice of Appearance of G. Eric Brunstad were sent via first class mail, postage prepaid, to Thomas M. Germain, Esq., 10 Columbus Boulevard, Hartford, CT 06103.

/s/ G. Eric Brunstad
G. Eric Brunstad

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS GERMAIN, TRUSTEE FOR :
THE ESTATE OF O'SULLIVAN'S
FUEL OIL CO., INC.

-vs- : Civil No.
H-89-663 (PCD)

THE CONNECTICUT NATIONAL :
BANK

RULING ON BANKRUPTCY APPEAL

On September 6, 1989, Judge Krechevsky, Chief Bankruptcy Judge, denied CNB's motion to strike the trustee's request for trial by jury in an adversary proceeding and, since both parties agreed that the bankruptcy court had no authority to conduct a jury trial, he directed the parties to take appropriate steps to remove the proceeding from the bankruptcy court. On November 14, 1989, this court granted CNB's motion for leave to appeal Judge Krechevsky's ruling.

The following are the facts and procedural history as set forth by the bankruptcy court. As they are not contested, they will be adopted for the purposes of this appeal. Debtor, O'Sullivan's Fuel Oil, Inc., filed a voluntary Chapter 11 petition on January 18, 1984. The case was converted to a proceeding under Chapter 7 on July 30, 1986, and a trustee was appointed. On June 1, 1987, the trustee commenced suit against CNB in Superior Court claiming that CNB is liable to the estate in money damages for willful interference with the debtor's business, collusion and duress, fraudulent misrepresentation, violation of RICO, breach of obligation to act in good faith, and violation of CUTPA.

Trustee's claim alleged that: The debtor was in the business of selling fuel oil to retail accounts. During 1981, debtor borrowed $500,000 from First Bank, which merged with CNB in March 1984. First Bank received a mortgage lien on the debtor's fuel oil storage facility as security. CNB has filed a proof of claim in the bankruptcy proceedings. Starting in November 1983, approximately two months prior to the filing of the debtor's bankruptcy petition, First Bank undertook to exercise control of the debtor in order to serve First Bank's own interests. First Bank demanded that one James Tisdale be placed in control of the debtor's business and recommended that debtor file a Chapter 11 petition utilizing a law firm selected by the bank. After the filing of the petition, First Bank or CNB required the debtor to replace its insurance agency: insisted that Tisdale and his brother remain in control of debtor's business when they had no competence to operate the business and wasted its assets; resisted shareholder efforts to oust the Tisdales by threatening to terminate financing and force the business to close; encouraged the organization of a successor corporation by the Tisdales to take over debtor's assets; and misused court-approved financing to satisfy its pre-petition debt. These actions continued until the Tisdales relinquished control in August 1984.

CNB removed the trustee's action to bankruptcy court on July 15, 1987. *See* 28 U.S.C. § 1452; Bankruptcy Rule 9027. After CNB answered, the trustee filed a timely request for a jury trial. This court subsequently dismissed the trustee's RICO claim, approved Judge Krechevsky's recommendation that the proceeding in issue is a core proceeding as it arose, for the most part, in a bankruptcy proceeding under Chapter 11, and denied the trustee's motion to withdraw the reference.

CNB then moved to strike the trustee's demand for a jury trial. Judge Krechevsky determined that the trustee has a right to a jury trial in an adversary proceeding he commenced in state court to recover monetary damages for torts and contract violations allegedly committed by CNB and First Bank, post-petition, and denied CNB's motion to strike. He also

ordered the parties to remove the case from the bankruptcy court based on their agreement that the bankruptcy court has no authority to conduct such a jury trial.

Discussion

CNB argues that the estate, acting through a Chapter 7 trustee, has no right to a jury trial when it sues a creditor who has filed a proof of claim on the basis of the creditor's post-petition misconduct while the case was subject to the jurisdiction and supervision of the bankruptcy court. Thus CNB contends that this case arises out of the restructuring of debtor/creditor relations in the bankruptcy proceeding and should be tried by the bankruptcy court, not a jury.

Judge Krechevsky relied primarily on *Granfinanciera, S.A. v. Nordberg*, 492 U.S. ___, 109 S. Ct. 2782 (1989), in holding that the trustee has a right to a jury trial under the Seventh Amendment. In that case, the trustee sued petitioners in the bankruptcy court seeking to avoid allegedly fraudulent transfers to them by the bankrupt corporation. The bankruptcy code designates such fraudulent conveyance actions as "core proceedings" which may be adjudicated by the bankruptcy court. 28 U.S.C. § 157(b)(2)(H). The Supreme Court held that at common law parties to a fraudulent conveyance action were entitled to a jury trial and that Congress, in designating such as a "core" proceeding, could not eliminate a party's Seventh Amendment right to a jury trial.

Whether petitioners had a Seventh Amendment right to a jury trial requires a two step analysis. First, the court must determine whether the cause of action would have been tried to a jury at common law and if so, whether the remedy sought is legal rather than equitable in nature. Second, the court must consider "whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder."

That the action has been designated as "core" is not controlling. The Supreme Court undertook a "public rights-private rights" analysis to resolve the second element. If the cause implicates a public right, Congress can deny the parties a jury trial without violating the Seventh Amendment. Public rights are defined as "statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or specialized court of equity." *Granfinanciera*, 109 S. Ct. at 2797 & n.10; *see Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 71 (1982) (Article I courts can adjudicate claims at the core of bankruptcy because such claims are public rights, and central to Congress' constitutional bankruptcy power). If a private right is involved, Congress cannot affect the party's Seventh Amendment right to a jury trial. A private right is defined as "the liability of one individual to another under the law as defined," such as "[w]holly private tort, contract, and property cases." *Granfinanciera*, 109 S. Ct. at 2795 & n.8.

CNB contends since the trustee's claims arise out of the alleged mishandling of the post-petition administration of the bankruptcy estate, they require a determination of equitable rights arising during the course of the bankruptcy proceedings and thus are not claims at law within the meaning of the Seventh Amendment. Judge Krechevsky held that the trustee's "complaint, bottomed on allegations of tort and contract violation, seeks money damages and presents a legal claim triable before a jury." Ruling on Motion to Strike at 8. CNB concedes that monetary damages are generally a legal remedy and that the state law claims appear on their face to be legal in nature. However, it contends that resolution of the claims would require not only a working knowledge of bankruptcy law but also application of bankruptcy law.

That the alleged misconduct arose post-petition, while the case was under the jurisdiction and supervision of the bankruptcy court, does not transform the estate's claims into ones arising under the bankruptcy court's equitable jurisdiction. The trustee is not challenging the administration of the bankruptcy proceeding but contends that CNB and its predecessor First Bank exercised unlawful influence and control over the debtor to its advantage and to the detriment of the debtor. Although the estate's claims will have to be considered in the context of a bankruptcy proceeding, it does not strip them of their legal nature.

CNB next argues that this case is distinguishable from *Granfinanciera* because the estate, not the creditor, is the party claiming a jury trial. Judge Krechevsky dealt with this argument by asserting that he saw "no logical basis for denying a plaintiff bankruptcy trustee the same right to claim a jury trial otherwise available to a defendant in the litigation." Ruling on Motion to Strike at 8. CNB argues that *Katchen v. Landy*, 382 U.S. 323 (1966), vests the bankruptcy court with full authority to adjudicate the trustee's claims under its equitable jurisdiction. In *Katchen*, a creditor who filed a proof of claim against the estate claimed that he was entitled to have the estate's preference action against him adjudicated before a jury. The Supreme Court reasoned that by submitting a claim against the bankruptcy estate, creditors subject themselves to the courts equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature.

CNB argues that since it has filed a proof of claim, the trustee is barred from claiming a jury trial on its counterclaims CNB, however, misconstrues the nature of the trustee's claims and their relationship to its proof of claim. In *Katchen*, the trustee objected to allowance of the creditor's claim and brought an action to surrender a preference allegedly held by the creditor. The objection to the creditor's proof of claim was based solely on his receipt of the allegedly voidable preference. *Katchen*, 382 U.S. at 330. Thus the allowance of the claim was necessarily tied to resolution of the preference issue. In this case, the trustee's claims are not necessary to the determination of CNB's proof of claim. The trustee asserts that he has not objected to CNB's claim, nor challenged the validity of the notes underlying the proof of claim. Rather, he is

seeking damages against CNB with respect to its post-petition conduct in an effort to increase the size of the estate.

CNB also argues that the estate, and the trustee as its representative, are subject to the consequences of submitting this case to the jurisdiction of the bankruptcy estate by filing a petition in bankruptcy, including the loss of the right to a jury trial for the adjudication of post-petition claims that arise out of the administration of the estate. This argument has been implicitly rejected by the Second Circuit. *In re Ben Cooper, Inc.*, No. 89-5026, 1990 U.S. App. LEXIS 2094 (2d Cir. Feb. 7, 1990). In that case, the debtor in possession[1] commenced an adversary proceeding in the bankruptcy court in relation to a post-petition insurance contract. The debtor sought a declaratory judgment that the policy remained in effect and damages from its insurance brokers for alleged negligence and malpractice in procuring the policy. The court found this claim to be intrinsically related to estate administration and thus within the bankruptcy court's core jurisdiction. Although the court held that resolution of the debtor's post-petition state law claims was an essential part of administering the estate, it concluded that the claims were inherently legal and thus the defendants in the adversary proceeding were entitled to a jury trial. That the claims arose from post-petition conduct and were intimately related to estate administration did not affect the defendants' Seventh Amendment rights. As noted by Judge Krechevsky, there is no logical reason not to extend this same right to a jury trial to the trustee.

Finally, having found the trustee's tort and contract claims to be legal in nature and subject to the Seventh Amendment's protection of the right to a jury trial, it must be determined whether the claims implicate public rights and thus are subject to Congressional deprivation of the right to a jury trial. The trustee's claims are based solely on state law theories and not on any congressionally-created right that is "an integral part of a public regulatory scheme." "[S]tate-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate . . . [are] matters of private rather public right." *Granfinanciera*, 109 S. Ct. at 2798. The trustee is entitled, pursuant to the Seventh Amendment, to a jury trial on the claims in issue.

Judge Krechevsky ordered the parties to remove the adversary proceeding from the bankruptcy court because "both parties agree[d] that the bankruptcy court has no authority to conduct a jury trial so that that issue, expressly left undecided by *Granfinanciera*, [wa]s not before [him] for a ruling." Ruling on Motion to Strike at 8. Subsequent to Judge Krechevsky's ruling and after the appeal sub judice was briefed, the Second Circuit "f[ou]nd that *Granfinanciera* does not foreclose the possibility of jury trials in the bankruptcy court." *Cooper*, slip op. at 1598. The court found no constitutional or statutory bar to a bankruptcy court holding a jury trial in a core proceeding. In view of the fact that this adversary proceeding was commenced in 1987 and the substantial potential for further delay if the case is to be removed from the bankruptcy court to be tried in an as yet undetermined forum, the matter will be remanded to the bankruptcy court for consideration, in light of the *Cooper* case, of the issue of whether it can conduct a jury trial on the trustee's claims in this action.

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[1] A debtor in possession has all the rights and powers of a trustee. 11 U.S.C. § 1107(a). In addition, the trustee stands in the shoes of the debtor and can only assert claims on behalf of the estate possessed by the debtor, subject to all defenses valid against the debtor. Accordingly, that an action is commenced by the trustee rather than the debtor would be irrelevant for Seventh Amendment purposes.

Summary

CNB's appeal of the denial of its motion to strike is dismissed. Judge Krechevsky's ruling that the trustee is entitled to a jury trial in the adversary proceeding in issue is affirmed. The matter is remanded to the bankruptcy court for consideration of the propriety of conducting such jury trial in the bankruptcy court.

SO ORDERED.

Dated at Hartford, Connecticut, this 22nd day of March, 1990.

/s/ Peter C. Dorsey
Peter C. Dorsey
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.	)	
-vs-	)	CIVIL NO. H-89-663 (PCD)
THE CONNECTICUT NATIONAL BANK	)	APRIL 2, 1990

MOTION TO AMEND ORDER

Pursuant to 28 U.S.C. § 1292(b), Rule 52(b) F.R.Civ.P., and Rule 5(a) F.R.App.P., The Connecticut National Bank ("CNB") hereby moves the Court to amend its Order of March 22, 1990 in the above-captioned proceeding to add the following statement:

> The Order of the Court involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

In support therefore, CNB respectfully represents as follows:

5/16/90: Granted absent opposition, Local Rule 9(a)(1), and for the reasons set forth in this court's ruling on motion for leave to appeal which permitted CNB to appeal to this court under the standards in 28 U.S.C. § 1292(b). SO ORDERED.

/s/ Peter C. Dorsey, USDJ
Peter C. Dorsey, USDJ

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 1989

(Submitted July 17, 1990 Decided: (February 15, 1991)
Docket No. 90-8054

THOMAS M. GERMAIN, TRUSTEE FOR
THE ESTATE OF O'SULLIVAN'S
FUEL OIL CO., INC.,
Plaintiff-Respondent,

V.

THE CONNECTICUT NATIONAL BANK,
Defendant-Petitioner.

Before: WINTER, MAHONEY and WALKER,
Circuit Judges.

Petitioner seeks leave to appeal from a district court order affirming an interlocutory order of the bankruptcy court. We hold that we have no jurisdiction and dismiss the petition.

Thomas M. Germain, Hartford, Connecticut, *for Plaintiff-Respondent.*

G. Eric Brunstad, Hartford, Connecticut (Janet C. Hall, Robinson & Cole, Hartford, Connecticut, of counsel), *for Defendant-Petitioner.*

WINTER, Circuit Judge:

This petition for leave to appeal raises the question of whether we have appellate jurisdiction under 28 U.S.C. § 1292(b) to review a district court order affirming an interlocutory order entered by the bankruptcy court. This issue turns on whether 28 U.S.C. § 158(d) precludes by negative implication interlocutory review under Section 1292. We conclude that it does and dismiss the petition.

BACKGROUND

In 1981, O'Sullivan's Fuel Oil Co., Inc. ("O'Sullivan") borrowed $500,000 from First Bank. As security, First Bank, which later merged with The Connecticut National Bank ("CNB"), received a mortgage lien on O'Sullivan's fuel oil facility. O'Sullivan's fortunes declined, and, on January 18, 1984, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-74 (1988). CNB in turn filed a proof of claim. Two and one-half years later the bankruptcy court converted the Chapter 11 reorganization into a Chapter 7 liquidation, *see* 11 U.S.C. §§ 701-66 (1988), and appointed Thomas M. Germain as Trustee for the debtor's estate.

On June 1, 1987, Germain, as Trustee, commenced an action against CNB in a Connecticut state court. The suit alleged that beginning in November 1983, roughly two months before O'Sullivan filed for bankruptcy protection, First Bank attempted to assume control of the company by demanding *inter alia* that O'Sullivan surrender control of the business and its assets to an individual of the Bank's choosing, that O'Sullivan file a Chapter 11 proceeding utilizing a law firm selected by the Bank, and that O'Sullivan replace its insurance agency. Based on these and subsequent alleged efforts to assert control, the Trustee sought damages based on various claims sounding in tort and contract, a claim under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. Ann. §§ 42-110a to -110q (West 1987 & Supp. 1990), and, of course, a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68 (1988).

CNB removed the action to bankruptcy court, whereupon the Trustee filed a demand for a jury trial and moved to withdraw the bankruptcy court's reference. After the district court dismissed the Trustee's RICO claim and denied his motion to withdraw the bankruptcy reference, CNB moved before the bankruptcy court to strike the Trustee's jury demand. The bankruptcy court denied CNB's motion on the ground that the Trustee was seeking money damages based on tort and contract claims and thus was entitled to a jury trial. CNB sought leave to appeal to the district court which was granted pursuant to 28 U.S.C. § 158(a). The district court affirmed and thereafter certified an interlocutory appeal under 28 U.S.C. § 1292(b). CNB seeks leave to appeal as provided by Fed. R. App. P. 5(a).

DISCUSSION

Appellate jurisdiction over bankruptcy court decisions exists in district courts pursuant to 28 U.S.C. § 158(a)[1] or in bankruptcy appellate panels in circuits where such a panel has been established under Section 158(b).[2] Section 158(d) provides for review by courts of appeals of "final" orders of a district court or bankruptcy panel.[3] Because Section 158(d) does not provide for court of appeals jurisdiction over interlocutory orders of a district court reviewing an order of a bankruptcy court, CNB seeks to invoke our jurisdiction under 28 U.S.C. § 1292(b).[4]

Although both parties appear desirous of our hearing the appeal, we *sua sponte* address the question whether Section 158(d) precludes by negative implication appellate jurisdiction under Section 1292(b) of interlocutory decisions rendered under Section 158(a). This issue is not without difficulty. Unless Section 158(d) provides the exclusive means of court of appeals review of orders entered under Subsection (a), it is arguably superfluous because courts of appeals already have appellate jurisdiction under 28 U.S.C. § 1291 over final decisions of district courts. If Section 158(d) is exclusive, of course, then we have no jurisdiction under Section 1292(b).

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[1] Section 158(a) reads:

> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 158(a) (1988).

[2] Section 158(b) reads in pertinent part:

> (1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.
>
> (2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

28 U.S.C. § 158(b) (1988).

[3] Section 158(d) reads:

> The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 158(d) (1988).

[4] Section 1292(b) reads, in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order
>
> . . . .

28 U.S.C. § 1292(b) (1988).

However, reading Section 158(d) as the exclusive basis for appellate jurisdiction creates an anomaly in that a district court may withdraw any matter from the bankruptcy court under 28 U.S.C. § 157(d), and its decisions are thereafter reviewable under Sections 1291 and 1292. *See In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1282-83 (2d Cir. 1990). If Section 158(d) is exclusive, then interlocutory orders entered by district courts that have withdrawn a case under Section 157(d) would be reviewable, if injunctive in nature, under Section 1292(a)(1) or, if not injunctive, upon certification under Section 1292(b), while identical interlocutory orders entered under Section 158(a) would be unreviewable. It is tempting, therefore, to say that interlocutory orders entered under Section 158(a) are reviewable under Section 1292. However, that may create a new anomaly. Section 158(d) provides appellate jurisdiction for final orders entered under Subsections (a) and (b). Subsection (b) provides for the creation and operation of appellate panels of bankruptcy judges, and, arguably, it would overly stretch Section 1292 to hold that an order entered by such an appellate panel under Subsection 158(b) might be subject to review as an interlocutory injunction under Section 1292(a)(1) or discretionary review after certification under Section 1292(b).

Our cases are in disarray on the jurisdictional question. In *In re Johns-Manville Corp.*, 824 F.2d 176 (2d Cir. 1987), we held that the district court's affirmance of an order denying a request for appointment of a shareholders' committee was non-final within the meaning of Section 158(d). In doing so, we relied on the view that the law provides

> adequate avenues of immediate appellate review for denial of motions to appoint shareholder committees without automatic, immediate access to the courts of appeals during the pendency of a bankruptcy proceeding. Under 28 U.S.C. § 158(a), district courts are authorized to review interlocutory orders of the bankruptcy courts. Moreover, district courts may certify for appeal to the courts of appeals any interlocutory order meeting the statutory criteria of 28 U.S.C. § 1292(b).

Id. at 180. Our next brush with this issue was *LTV Corp. v. Farragher (In re Chateaugay Corp.)*, 838 F.2d 59 (2d Cir. 1988). That case involved Section 1292(a)(1) rather than Section 1292(b), but we perceive no principled grounds for distinguishing between these subsections for purposes of determining our appellate jurisdiction. *LTV* held that we lacked jurisdiction to hear an appeal from a district court's vacating and remanding an injunctive order entered by the bankruptcy court for entry of a new order. In doing so, *LTV* stated:

> Nor are we persuaded by the argument . . . that sections 1291 and 1292 of Title 28 (allowing appeals from district court final decisions and certain interlocutory orders, 28 U.S.C. §§ 1291, 1292) provide jurisdiction in this case. The order . . . is not final as required by section 1291, and, while we have recognized the applicability of section 1292 to determinations made by a district court sitting in bankruptcy, *see In re Feit & Drexler, Inc.*, 760 F.2d 406, 411-13 (2d Cir. 1985), we believe that section 158(d) remains the exclusive basis for jurisdiction for decisions entered under paragraphs (a) and (c) of section 158. . . . Therefore, our finding that the district court's decision was not final requires us to conclude that we have no authority to hear this action under section 158(d).

Id. at 62-63. *LTV* made no mention of *Johns-Manville*, although the pertinent language in *LTV* is, in contrast to the language in *Johns-Manville*, clearly a holding.

LTV, however, appears never to have been cited for that holding, perhaps because the West Publishing Co. did not accord a headnote to it. The next year, *NLRB v. Goodman*, 873 F.2d 598 (2d Cir. 1989), held to the contrary without refer-

ring to LTV. In that case, we reviewed a district court's remand of an issue that was related to an interlocutory injunction. We held:

> Ordinarily, a remand to the bankruptcy court by a district court is not a final, appealable order under 28 U.S.C. § 158(d) (1982), unless the remand effectively settles an issue and orders the bankruptcy court to perform merely a ministerial task. *See In re Vekco, Inc.*, 792 F.2d 744 (8th Cir. 1986); *In re Fox*, 762 F.2d 54 (7th Cir. 1985). In this case, however, the Bankruptcy Court effectively enjoined the Labor Board from proceeding against Goodman and [another party]. The District Court's order, although remanding a substantive issue for reconsideration by the Bankruptcy Court, refused to dissolve the injunction. The order is therefore appealable under 28 U.S.C. § 1292(a)(1) (1982).

Id. at 601-02. Since then, in *New York State Department of Taxation and Finance v. Hackeling (In re Luis Elec. Contracting Corp.)*, 917 F.2d 713, 716-17 (2d Cir. 1990), we have exercised appellate jurisdiction, without addressing the issue, over an interlocutory injunction issued by a bankruptcy court and affirmed by a district court.

The disarray of our decisions is matched by similar disagreements among the circuits, which are amply described in *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749 (4th Cir. 1990), and need not be detailed here. Although *Goodman* appears to be our latest holding on this matter, we address the issue *de novo* and have circulated this opinion to the active members of the court. *See United States v. Reed*, 773 F.2d 477, 478 (2d Cir. 1985).

We conclude that Section 1292(b) does not provide jurisdiction in the instant matter. To be sure, nothing in Section 158(d) expressly negates jurisdiction. That provision simply does not mention interlocutory appeals. The fact that it would

appear to be superfluous if not our exclusive source of our jurisdiction does, however, imply that it is exclusive. More importantly, the legislative history of Section 158(d) indicates that Congress intended to limit court of appeals jurisdiction over decisions of bankruptcy courts to final decisions.

Section 158(d)'s predecessor was 28 U.S.C. § 1293(b), which differed in language but not in substance. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 236(a), 92 Stat. 2549, 2667. Although enacted in 1978, Section 1293(b)'s effective date was in 1984. *See id.* at § 402(b), 92 Stat. 2549, 2682. Before it became effective, Section 158(d) was passed, apparently as a substitute for Section 1293(b). *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104, 98 Stat. 333, 341. Most of the pertinent legislative history, therefore, is in the Bankruptcy Act of 1978.

The course of events in Congress leading to passage of Section 1293(b) appears to have been as follows. The bill passed by the House, H.R. 8200, would have conferred Article III status upon bankruptcy judges and would have treated bankruptcy courts as on a par with district courts. It thus would have eliminated the long-standing practice of appellate review of bankruptcy court decisions by district courts and would have amended Section 1291 to provide for direct appellate review of bankruptcy decisions by courts of appeals. It similarly would have amended Section 1292 to provide for direct appeals from interlocutory orders of bankruptcy courts in the case of injunctions or certified questions. H.R. 8200, 95th Cong., 2d Sess., 124 Cong. Rec. 1786 (Feb. 1, 1978) (setting forth sections 237-39 of bill); *id.* at 1804 (passage of bill). That the implications of this were fully understood is made clear by the discussion in the relevant House Report concerning these provisions and in particular their impact on the caseload of the courts of appeals. H.R. Rep. No. 595, 95th Cong., 2d Sess. 40-43, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6001-04.

The Senate bill, S. 2266, as reported out by the Judiciary Committee, did not confer Article III status on bankruptcy judges and would have continued the practice of appeals to the district courts. It contained no explicit provision for subsequent review by the courts of appeals. The Senate Judiciary Committee Report did contain the puzzling statement that "[a]ppeals may be taken by writ of certiorari from the district court to the United States court of appeals ... 28 U.S.C. § 1291." S. Rep. No. 989, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5804. There was, however, no provision in S. 2266 establishing a certiorari procedure, and the Report's remark may well have reflected a misunderstanding of Section 1291. In any event, on the Senate floor, the text of S. 2266 was substituted for the text of H.R. 8200. 124 Cong. Rec. 28284 (Sept. 7, 1978).[5] When this substitution was made, the provisions of S. 2266 relevant to the instant matter were as reported out of the Judiciary Committee.

Although the House and Senate versions of H.R. 8200 differed, no conference was held. Instead, on September 28, the House voted to accept the Senate version of H.R. 8200 subject to further amendments. 124 Cong. Rec. 32350, 32420 (Sept. 28, 1978). In accepting the Senate version, the House abandoned the original provisions of H.R. 8200 that had amended Sections 1291 and 1292 to allow direct appeals from final and interlocutory orders of bankruptcy courts to courts of appeals. However, the House also added amendments to the substitute, three of which are pertinent to the instant matter. First, it created a new Section 1293 in Title 28 that provided for court of appeals jurisdiction over final decisions of the new bankruptcy panels and court of appeals jurisdiction over final decisions of bankruptcy courts if the parties agreed

[5] Two weeks later, Senator Byrd requested and received unanimous consent to vitiate the passage of H.R. 8200 and offer an amendment in the nature of a substitute deleting certain references to federal taxes and certain provisions that amended the federal tax laws. 124 Cong. Rec. 30960 (Sept. 22, 1978). However, that detour has no bearing on the jurisdictional amendments here pertinent.

to such a direct appeal. 124 Cong. Rec. 32385 (Sept. 28, 1978). Second, Section 1334 of Title 28 was amended to provide for appellate review by district courts of final orders of bankruptcy courts and district court review of interlocutory orders of bankruptcy courts but only by leave of the district court. *Id.* Third, it provided for review of final decisions and interlocutory decisions (again upon leave) of bankruptcy courts by appellate bankruptcy panels in a new 28 U.S.C. § 1482. *Id.* at 32386. None of the September 28 amendments addressed court of appeals jurisdiction over decisions of district courts reviewing decisions of bankruptcy courts.

The action then returned to the Senate. The Senate concurred in the House's amendments, but added yet further amendments of its own. 124 Cong. Rec. 33989-34019 (Oct. 5, 1978). One of the October 5 Senate amendments added language to the new Section 1293(b) that was in substance what is now provided by Section 158(d), namely court of appeals jurisdiction over "final" decisions of district courts reviewing a bankruptcy court. *Id.* at 33991. The House then adopted the Senate amendments. 124 Cong. Rec. 34143 (Oct. 6, 1978).

In 1984, Congress adopted with only cosmetic changes the scheme of the 1978 Act concerning appellate review. Section 158(a) provided for district court review of final bankruptcy court orders and district court review of interlocutory bankruptcy court decisions by leave of the district court. Section 158(d) provided for court of appeals review of final decisions of a district court reviewing decisions of a bankruptcy court. The only further wrinkle occurred when Congress added the procedure for district court withdrawal of a matter from the bankruptcy court. 28 U.S.C. § 157(d). No appellate procedures were provided for decisions in withdrawn cases, and Section 1291 and 1292 are applicable in light of the fact that withdrawn cases are within the original jurisdiction of district courts. *See In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1282-83 (2d Cir. 1990).

Some of the confusion concerning Section 158(d) may have arisen from the complexity of the interplay between the two houses of the Congress and the lack of commentary on issues concerning court of appeals jurisdiction during proceedings on the floor. The House Committee Report, as noted, contained an explicit discussion of the issue. The Senate Report, as also noted, was more enigmatic and perhaps reflected a misunderstanding of appellate jurisdiction as it existed at the time. Although major changes occurred thereafter, including deletion of the provisions of H.R. 8200 that would have authorized review under Sections 1291 and 1292, there was no commentary on the floor of either House regarding these changes, and the lack of a conference eliminated whatever light might have been shed by a conference report.

Nevertheless, this is a case of actions-speaking louder than words, and the events described above reflect a deliberate congressional intent to limit court of appeals jurisdiction over bankruptcy decisions. The interplay between the House and Senate was conscious and informed as each responded to changes proposed by the other. The original bill passed by the House gave to the courts of appeals direct appellate jurisdiction over bankruptcy courts by appropriate amendments to Sections 1291 and 1292. When the Senate chose to continue appellate jurisdiction in district courts, the House acceded by deleting the proposed amendments to Sections 1291 and 1292 and substituting provisions for appellate review by district courts of final bankruptcy court decisions and of interlocutory bankruptcy court decisions upon leave of the district court. The House did not include in this amended version any explicit provision for court of appeals review of either final or interlocutory decisions of district courts reviewing decisions of bankruptcy courts. Although final decisions might be reviewable under Section 1291, review of interlocutory decisions would have been severely limited because such review would appear to have been limited to cases in which the district court had already granted leave. In those circumstances, the Senate's subsequent addition of the substance of Section 158(d) providing for court of appeals review of final

decisions of district courts reviewing bankruptcy decisions strongly indicates that court of appeals jurisdiction was intended to be limited to review of such final decisions.

The creation of the withdrawal procedure in 1984, however, created an apparently unnoticed anomaly. If Section 158(d) precludes court of appeals review of interlocutory decisions of bankruptcy courts, including injunctions, Supreme Court review also will be barred. In such circumstances, interlocutory bankruptcy decisions by district courts, including injunctions, acting in their original jurisdiction after a withdrawal of referral under Section 157(d), would be subject to review by a court of appeals and by the Supreme Court. However, an interlocutory decision by a bankruptcy court, involving the identical legal issue, would be subject only to discretionary review by district courts. No further review would be available. Court of appeals and Supreme Court jurisdiction would thus depend entirely on whether the district court had maneuvered the appeal into the proper procedural posture. A district court desiring to make appellate review available under Section 1292 could withdraw the bankruptcy court's reference and reaffirm that court's interlocutory order. A district court wishing to avoid such review could do so by not withdrawing reference to the bankruptcy court.

We are unpersuaded, however, that this anomaly is cause to treat Section 158(d) as superfluous and to ignore its history. First, the history detailed above indicates that in 1978 Congress intended to eliminate court of appeals jurisdiction over interlocutory orders of bankruptcy courts. The oversight, if any, occurred in 1984 when the withdrawal procedure was introduced, subjecting interlocutory decisions of district courts in withdrawn cases to review under Section 1292.

Second, the anomaly is not fatally serious. Even if review of an interlocutory district court decision in a non-withdrawn case was available under Section 1292(b), that review could be avoided by a district court's declining to grant leave under Section 158(a). Moreover, whether Section 1292 can be

stretched to include review of interlocutory decisions of bankruptcy panels seems at least in doubt. Finally, there is rough, if not complete, symmetry in limiting interlocutory appeals to: (i) discretionary review by the district court under Section 158(a) in non-withdrawn cases, and (ii) court of appeals review of interlocutory decisions in withdrawn cases under Section 1292.

The Third Circuit has strongly argued against giving force to the negative implication of Section 158(d) and stated in *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 200 n.7 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983):

> Given the enormity of the change in law which would bar all court of appeals and Supreme Court review of interlocutory orders in bankruptcy cases, and the complete absence of discussion of such a change [in the legislative record], we are not ready to assume without critical analysis that those courts which have held such review to be barred are correct.

Thus, if Section 158(d) precludes interlocutory review under Section 1292, "the bankruptcy courts have been given pendente lite powers, subject only to district court review, equivalent to those exercised by the federal circuit courts prior to the passage of the Evarts Act in 1891." *Coastal Steel*, 709 F.2d at 199.

We by no means suggest that these arguments lack force as policy statements. Indeed, it might also be argued that the result we reach is not consistent with the canon of construction disfavoring repeals by implication. Such an argument, however, ignores the fact that Section 1292 is clearly "repealed" with regard to all interlocutory decisions of bankruptcy courts except for those for which leave to appeal is granted by a district court under Section 158(a). The "repeal" we infer from Section 158(d) is thus part of a far greater explicit repeal. The canon disfavoring interpretations that render statutory language superfluous – as would be the fate of Section 158(d) were we to adopt a different result – would thus seem to prevail. Canons aside, we have concluded that Congress made a deliberate and informed policy decision that is binding upon us. This conclusion is in accord with the weight of opinion in other circuits. *See Capitol Credit Plan of Tenn., Inc. v. Shaffer*, 912 F.2d 749, 754 (4th Cir. 1990) (§ 1292(b) inapplicable); *In re Atencio*, 913 F.2d 814, 816 (10th Cir. 1990) (§ 1292(a) inapplicable); *In re Kaiser Steel Corp. (Kaiser Steel Corp. v. Frates)*, 911 F.2d 380, 386 (10th Cir. 1990) (§ 1292(b)); *In re Hester (Hester v. NCNB Tex. Nat'l Bank)*, 899 F.2d 361, 365 (5th Cir. 1990) (§ 1292(a)); *In re First South Sav. Ass'n*, 820 F.2d 700, 708-09 (5th Cir. 1987) (§ 1292(a)); *In re Teleport Oil Co. (Teleport Oil Co. v. Security Pac. Nat'l Bank)*, 759 F.2d 1376 (9th Cir. 1985) (§ 1292(a)). *But see In re Jartran, Inc.*, 886 F.2d 859, 865 (7th Cir. 1989) (§ 1292(b)).

Dismissed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of February, one thousand nine hundred and ninety-one.

Present: HON. RALPH K. WINTER
HON. J. DANIEL MAHONEY
HON. JOHN M. WALKER, JR.

Circuit Judges,

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,

Plaintiff-Respondent,

-v- Docket No. 90-8054

THE CONNECTICUT NATIONAL BANK,

Defendant-Petitioner.

A petition for leave to appeal from a district court order affirming an interlocutory order of the bankruptcy court having been filed.

ON CONSIDERATION THEREOF, it is

ORDERED that the petition be and it hereby is dismissed for lack of jurisdiction in accordance to the opinion of this court.

Elaine B. Goldsmith, Clerk
By:
/s/ Edward J. Guardaro
Edward J. Guardaro,
Deputy Clerk

STATUTES

11 U.S.C. § 47(a) (repealed 1978)

§ 47. Jurisdiction of Appellate Courts. a. The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

11 U.S.C. § 305 (1990)

§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if –

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2)(A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a) (2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title [sic] or by the Supreme Court of the United States under section 1254 of this title [sic].

28 U.S.C. § 151 (1984)

§ 151. Designation of bankruptcy courts

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 157 (1986)

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court

in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 1293 (repealed 1984)

§ 1293. Bankruptcy appeals

(a) The courts of appeals shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title.

(b) Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judg-

ment, order, or decree of an appellate panel created under section 160 or a District court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

28 U.S.C. § 1334 (1990)

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United

States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C. § 1651 (1949)

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

29 U.S.C. § 110 (1984)

§ 110. Review by Court of Appeals of issuance or denial of temporary injunctions; record

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside expeditiously.

No. 90-1791

In The
Supreme Court Of The United States
October Term, 1991

THE CONNECTICUT NATIONAL BANK,
Petitioner,

v.

THOMAS M. GERMAIN, TRUSTEE FOR
THE ESTATE OF O'SULLIVAN'S
FUEL OIL CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Does the court of appeals have jurisdiction pursuant to section 1292(b) of title 28 of the United States Code over certified interlocutory orders of the district court affirming, modifying or reversing orders entered by the bankruptcy court?

LIST OF PARTIES

Petitioner, The Connecticut National Bank ("CNB"), is a federally chartered banking institution and is a wholly owned subsidiary of Hartford National Corporation, which in turn is a wholly owned subsidiary of Shawmut National Corporation.

Respondent, Thomas M. Germain, is the Chapter 7 Trustee for the estate of O'Sullivan's Fuel Oil Co., Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

OPINION BELOW

The decision of the United States Court of Appeals for the Second Circuit holding that it lacked jurisdiction under 28 U.S.C. § 1292(b) to consider CNB's appeal is reported at 926 F.2d 191 (2d Cir. 1991) and is reprinted in the Joint Appendix at pages 34-47.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The decision of the Court of Appeals for the Second Circuit sought to be reviewed by way of the petition for a writ of certiorari was decided on February 15, 1991. The petition for a writ of certiorari was filed with this Court on May 16, 1991 and granted on October 15, 1991.

STATUTES INVOLVED[1]

28 U.S.C. § 158 (1988)

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under section (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

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[1] In addition to the statutes reproduced herein, the following statutes which the case involves are reproduced in the joint appendix:
11 U.S.C. § 47(a) (repealed 1978)
11 U.S.C. § 305 (1990)
28 U.S.C. § 151 (1988)
28 U.S.C. § 157 (1986)
28 U.S.C. § 1293 (repealed 1984)
28 U.S.C. § 1334 (1990)
28 U.S.C. § 1651 (1949)
29 U.S.C. § 110 (1984)

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 1291 (1988)

§ 1291. Final Decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292 (1988)

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

[(4) Repealed. Pub.L. 97-164, Title I, § 125(a)(3), Apr. 2, 1982, 96 Stat. 36]

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after

the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order,

if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Claims Court under section 1631 of this title.

(B) When a motion to transfer an action to the Claims Court is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Claims Court pursuant to the motion shall be carried out.

STATEMENT OF THE CASE

In 1981, First Bank, which later merged with the Petitioner, The Connecticut National Bank ("CNB"), entered into a secured lending relationship with O'Sullivan's Fuel Oil Co., Inc. ("O'Sullivan's"). (J.A. 35). Subsequently, O'Sullivan's fortunes declined and on January 18, 1984, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 1101-1146. (J.A. 35). CNB filed a proof of claim on its outstanding debt. (J.A. 35). On July 30, 1986, the bankruptcy court converted the Chapter 11 reorganization into a Chapter 7 liquidation, 11 U.S.C. § 1112, and appointed Thomas M. Germain as Trustee for the debtor's estate. (J.A. 35).

On May 29, 1987, the Trustee commenced suit against CNB in the Superior Court for the State of Connecticut alleging that, prior to and during the course of the bankruptcy proceedings, CNB breached its contract and committed numerous tortious acts against the debtor and the debtor's estate. (J.A. 13). The counts of the Trustee's complaint alleged various common law causes of action as well as violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a-110o (1991), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1988). (J.A. 35).

The Trustee's suit was removed to the bankruptcy court by CNB. (J.A. 36). On August 24, 1987, the Trustee filed a demand for a jury trial. (J.A. 13). After the district court dismissed the Trustee's RICO claim and denied his motion to withdraw the bankruptcy reference, CNB moved in the bankruptcy court on November 2, 1988, to strike the Trustee's jury demand. (J.A. 36). On September 6, 1989, the bankruptcy court denied CNB's motion to strike. (J.A. 7).

CNB appealed this denial to the district court as a final order and, alternatively, sought leave to appeal, both pursuant

to title 28 of the United States Code, section 158(a). (J.A. 36). The district court ruled that there was no right of appeal, but granted leave to appeal on November 14, 1989. (J.A. 8-11). The district court affirmed the bankruptcy court's denial of CNB's motion to strike and thereafter certified an appeal, exercising the power granted, under section 1292(b) of title 28 of the United States Code, to district courts to certify appeals of interlocutory orders to the courts of appeals. (J.A. 36). CNB then sought leave to appeal in the Second Circuit as provided by section 1292(b).[1] (J.A. 36). The court of appeals dismissed the petition for lack of jurisdiction under section 1292(b). The court held that its appellate jurisdiction of matters decided by the district court that originated in the bankruptcy court is limited to review of final decisions, judgments, orders and decrees of district courts as provided under section 158(d). *Germain v. Connecticut National Bank*, 926 F.2d 191 (2d Cir. 1991) (J.A. 34-47).

On May 16, 1991, CNB filed a petition for a writ of certiorari with this Court to review the decision of the court of appeals. The petition was granted on October 15, 1991.

SUMMARY OF THE ARGUMENT

In concluding that section 158(d) of title 28 of the United States Code created an exclusive scheme of bankruptcy appellate jurisdiction in the courts of appeals, and thereby impliedly repealed section 1292(b) of the same title, the Second Circuit did not give due credit to the plain language of section 1292(b).

[1] In addition to seeking leave to appeal pursuant to 28 U.S.C. § 1292(b), CNB also filed a notice of appeal claiming jurisdiction under the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The court of appeals dismissed that appeal on the ground that the third requirement of the collateral order doctrine, that the issue presented be effectively unreviewable on appeal from a final judgment, was not satisfied. *Germain v. Connecticut National Bank*, 930 F.2d 1038, 1040 (2d Cir. 1991).

Section 1292(b) permits the taking of interlocutory appeals in any civil action upon certification by the district court and with leave of the court of appeals. Neither statutory provision by its terms precludes the operation of the other; the giving of effect to both would render neither meaningless nor mere surplusage.

Furthermore, the enactment of section 158 carried with it none of the usual indicia, in language or in legislative history, to suggest that it was intended to create an exclusive scheme for the taking of appeals in bankruptcy matters, thereby repealing other previously applicable jurisdictional statutes. The Second Circuit's interpretation of the legislative history led it to conclude, with respect to bankruptcy matters originating in the bankruptcy court, that section 1292(b) was repealed by negative implication. In the absence of any express indication of congressional intent in the legislative history of section 158, the Second Circuit based its conclusion on the interplay between the House and the Senate and the silence in section 158(d) on the topic of interlocutory appeals. However, a repeal will be implied only when Congress has expressed its intent to override existing law both clearly and manifestly. Congressional intent cannot be found in interplay and silence. In this regard, it appears particularly inappropriate to infer an intent to repeal from the mere enactment of what the Second Circuit considered to be redundant language.

Further, the Second Circuit's willingness to infer that Congress intended to repeal sections 1291 and 1292 by the enactment of section 158 ignored the consequences of such a drastic change and the extent to which it affected other available avenues of review by the court of appeals, such as mandamus. Finally, subsequent legislation suggests that Congress did not intend to divest the courts of appeals of their power to hear interlocutory appeals in bankruptcy cases.

ARGUMENT

I. INTRODUCTION

As added in 1958, section 1292(b) of title 28 grants to the court of appeals the discretion to hear appeals of certain interlocutory orders. The power to entertain these appeals arises only after the district court has certified the issue as appropriate for immediate review. The availability of such an appeal, limited as it is, serves an important purpose in permitting those issues that may be dispositive or controlling to be considered by the court of appeals before resources are expended to bring the case to a final judgment.

Section 1292(b) jurisdiction is available in the present case. The plain language of the statute says so, and it had been so applied for over twenty years. When Congress enacted section 158 of title 28 of the United States Code, it expressed no intent to affect a major change in appellate jurisdiction over bankruptcy matters decided in the first instance by the bankruptcy court or to create different appellate schemes effecting bankruptcy cases depending on whether the matter originated in the bankruptcy court or the district court.

In concluding that section 158 was intended as an exclusive appellate scheme in bankruptcy cases originating in the bankruptcy courts and that it repealed by implication sections 1291 and 1292, the court below could not cite to any words in the statute or in the legislative history that supports such a change because none in fact exist. Consistent with accepted rules of statutory construction, CNB submits that, in determining Congress' intent in enacting section 158, the failure of Congress to state in the statute that it was revoking section 1292 in bankruptcy proceedings alone should be conclusive of the issue of its intention: if it had wanted to work such a revocation, it would have said so. The total silence of the Congress, in the legislative history as well as in the statute, leaves no ground to support the implied revocation of section 1292(b) by the enactment of section 158(d).

II. JURISDICTION OF BANKRUPTCY MATTERS

Original and exclusive jurisdiction over all cases under the Bankruptcy Code[2] lies in the district courts. 28 U.S.C. § 1334(a). The district courts possess original but not exclusive jurisdiction over all civil proceedings arising under, arising in or related to cases under the Code.[3] 28 U.S.C. § 1334(b). Pursuant to section 157(a) of title 28, the various district courts may provide that all bankruptcy cases be automatically referred to the bankruptcy courts for the district. Most, if not all, district courts have adopted an automatic reference. Appeals of final and interlocutory orders of bankruptcy courts are generally governed by section 158(a).

However, not all bankruptcy matters are heard by the bankruptcy court. The district court may withdraw the reference of a bankruptcy case, withdrawing either the entire case or simply a proceeding within a case. 28 U.S.C. § 157(d). When a district court withdraws the reference, the district court hears the matter sitting as a bankruptcy court. Appeals of decisions of district courts sitting as bankruptcy courts

[2] 11 U.S.C. §§ 101-1330 (1990).

[3] In general, proceedings "arising under" the Code include causes of action that exist pursuant to specific statutory provisions in the Code, such as preference actions. 1 W. Collier, *Collier on Bankruptcy*, ¶ 3.01[iii], 3-23 to 3-26 (15th ed. 1991). Proceedings "arising in" bankruptcy cases include administrative proceedings, such as objections to claims. *Id.* at ¶ 3.01[v], at 3-29. Both "arising in" and "arising under" proceedings are commonly referred to as "core" bankruptcy matters. *See* 28 U.S.C. § 157(b)(2). "Related to" or non-core proceedings include causes of action that are independent of the provisions of the Bankruptcy Code and arise apart from the administrative bankruptcy process, such as a pre-petition state law tort claim. *See id.* at ¶ 3.01[iv], at 3-26 to 3-28. *See also* 28 U.S.C. § 157(b)(3) (determination of core and non-core matters) and § 157 (c)(1) (treating bankruptcy judge's power to hear non-core matters).

in withdrawn matters are governed by sections 1291 and 1292 of title 28.[4]

The narrow issue submitted to this Court and on which the circuits are divided is whether an interlocutory order of a district court, sitting in review of a bankruptcy court, may be appealed to the court of appeals pursuant to section § 1292(b).

III. BASES OF THE CONFLICT BELOW

As noted by the Fourth Circuit, the courts of appeals are split on the issue of the applicability of section 1292(b) to interlocutory appeals of district court orders entered in review of a matter originating in the bankruptcy court. *Capital Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 751-52 (4th Cir. 1990). A majority of courts, including the court below, have held that section 158(d) exclusively governs court of appeals review of all district court orders entered in review of the orders of the bankruptcy court. A minority of courts have held the opposite, concluding that section 158(d) is not an exclusive jurisdictional provision and that other jurisdictional statutes, including section 1292(b), apply in the context of such bankruptcy appeals.

Courts upholding the majority view have justified their conclusion that section 158(d) is exclusive on several grounds.

[4] *Matter of Topco, Inc.*, 894 F.2d 727, 736, *reh'g en banc denied*, 902 F.2d 955 (5th Cir. 1990); *In re Benny*, 791 F.2d 712, 717-20 (9th Cir. 1986); *In re Salem Mortgage Co.*, 783 F.2d 626, 632 n.15 (6th Cir. 1986); *In re Amatex Corp.*, 755 F.2d 1034, 1038-39 & n.4 (3d Cir. 1985).

Some courts had suggested that 28 U.S.C. § 158(d) also governs court of appeals review of district court orders entered in bankruptcy cases where the district court enters an order sitting as a bankruptcy court in withdrawn matters. *See In re Teleport Oil Co.*, 759 F.2d 1376, 1378 (9th Cir. 1985); *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (relying heavily on *Teleport*). These cases, however, have been subsequently repudiated. *See Topco*, 894 F.2d at 736-37 (rejecting *Barrier*); *Benny*, 791 F.2d at 717-20 (rejecting *Teleport*).

Some courts within the majority have taken the view that section 158 is comprehensive, thereby implicitly excluding other jurisdictional provisions. *See, e.g., In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (finding that section 158(d) appears to be comprehensive); *In re International Horizons, Inc.*, 689 F.2d 996, 1000 n.6 (11th Cir. 1982) (finding section 1293, the predecessor to section 158(d), to be exclusive and comprehensive).

Other courts have inferred that section 158(d) must be exclusive on the basis that, had Congress intended interlocutory review to be available in the court of appeals, Congress would have said so in section 158(d) in the same or similar manner that it did in section 158(a). *See, e.g., Capitol Credit*, 912 F.2d at 752-53 (noting that although section 158(d) "says nothing about whether it is . . . exclusive . . . the structure of the section infers its limits"); *In re Brown*, 803 F.2d 120, 122 (3d Cir. 1986) (Congress' failure to address interlocutory orders in section 158(d) implies intention "to restrict the ability of parties . . . to appeal district court orders"); *Barrier*, 776 F.2d at 1299 (inferring intent to exclude interlocutory review from failure to provide for it in section 158(d)).

Still other courts, including the court below, have reasoned that section 158(d) must be the exclusive grant of jurisdiction to the courts of appeals; otherwise, when compared to section 1291 of title 28,[5] it would be superfluous. *See, e.g., Germain*, 926 F.2d at 197 (J.A. 46); *In re Teleport Oil Co.*, 759 F.2d 1376, 1378 (9th Cir. 1985) ("If § 1291 still applied to final bankruptcy orders, § 158 would be superfluous."); *In re Kaiser Steel Corp.*, 911 F.2d 380, 385 (10th Cir. 1990) ("Construing section 1291 to apply to orders entered under section 158(a) clearly renders section 158(d) superfluous . . . .").

In contrast, courts adopting the minority view have done so on the ground that a literal reading of section 1292(b) indi-

[5] This section grants to the court of appeals jurisdiction to hear appeals from final decisions of the district court.

cates that it applies in a case such as this and that nothing in the text of section 158(d) or its legislative history suggests that the continued application of section 1292(b) would violate any manifest legislative intent. *See, e.g., In re Official Committee*, 943 F.2d 752, 755 n.2 (7th Cir. 1991) (disagreeing with *Germain*); *In re Jartran, Inc.*, 886 F.2d 859, 865 (7th Cir. 1989); *Matter of American Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988); *In re Moens*, 800 F.2d 173, 177 (7th Cir. 1986). *See also In re Salem Mortgage Co.*, 783 F.2d 626, 632 (6th Cir. 1986) (sections 158 and 1291 are alternative jurisdictional provisions); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 199-200 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983) (sections 158, 1291, 1292 and 1651 apply concurrently).

It is not possible to reconcile the divergent views of the majority and minority on the question of what effect section 158(d) has upon the jurisdiction of the courts of appeals pursuant to section 1292(b). It is the minority position, however, that reflects Congress' intent as determined by the application of well-recognized rules of statutory construction.

IV. THE PROVISIONS OF 28 U.8.C. § 1292(b) ARE CLEARLY APPLICABLE.

The court of appeals has jurisdiction to consider CNB's appeal because, by its plain language, section 1292(b) applies to this case. The fact that the subsequently-enacted section 158 also governs some appeals in bankruptcy cases is no basis upon which to conclude that section 158(d) and section 1292(b) may not both be given effect. To hold, as the majority of circuits have, that section 158(d) in effect has repealed both section 1291 and section 1292 is an extreme approach to the interpretation of the statute.

A. The Plain Meaning of Section 1292(b) Compels Its Application.

In construing a statute, the Court's duty is to give meaning to the legislature's intent. *Caminetti v. United States*, 242

U.S. 470, 485 (1917). The starting point for this inquiry is the statute's language. *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). When the statute's language is clear, the inquiry should end there. *Ron Pair*, 489 U.S. at 241; *United States v. Rutherford*, 442 U.S. 544, 551 (1979).

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.

Caminetti, 242 U.S. at 485. *See also United States v. Locke*, 471 U.S. 84, 95 (1985). This is especially so when it is the subject matter jurisdiction of the courts which is being considered. *See United States v. American Bell Tele.*, 159 U.S. 548, 549-50, 554 (1895) ("Where the appellate jurisdiction is described in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction . . .").

Section 1292(b) plainly provides for discretionary appeals of certain interlocutory orders of the district courts to the courts of appeals. Applying this statute to the instant case, it is clear that its requirements have been satisfied. The district court's order affirming the order of the bankruptcy court is an "order" of a "district judge" made in "a civil action . . . not otherwise appealable" under section 1292. 28 U.S.C. § 1292(b).[6] Furthermore, the district court certified its order as one involving a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. (J.A. 33). Thereafter, CNB timely filed a petition for leave to appeal with the

[6] *See Thomason v. Thomason*, 274 F. 2d 89, 90-91 (D.C. Cir. 1959) ("civil actions" include all equitable and legal actions). *See also* Fed. R. App. P. 6 advisory committee's note.

court of appeals. (J.A. 12). The district court's order thus falls within the boundaries of the jurisdictional grant contained in section 1292(b).

"The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " *Ron Pair*, 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). *See also Demarest v. Manspeaker*, ___ U.S. ___, 111 S. Ct. 599, 604 (1991); *Rubin v. United States*, 449 U.S. 424, 430 (1981). A plain reading of section 1292(b) compels its application in this case. There is nothing in the words of the statute or its purpose[7] which suggests a legislative intent to prevent the application of section 1292(b) in bankruptcy appeals. There is similarly no indication that application of section 1292(b) in this case would violate any of the enactment's underlying policies.[8] Indeed, application of section 1292(b) in the context of this case is consistent with the statute's stated and implicit goals. In fact, interlocutory review under section 1292(b) had long been permitted under pre-1978 bankruptcy law.[9] The plain, textual requirements of section 1292(b) have been satisfied in this case. The court below possessed the power to entertain the petition for leave to appeal.

[7] *See* S. Rep. No. 2434, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 5255 (discussing the purpose of section 1292(b)).

[8] The policy promoted by section 1292(b) is simple and straightforward: where an immediate appeal of an interlocutory order offers the opportunity to resolve the litigation efficiently, the court of appeals, in its discretion, may hear it. *Ford Motor Credit Co. v. S.E. Barnhart & Sons, Inc.*, 664 F.2d 377, 380 (3d Cir. 1981).

. This policy is consistent with the bankruptcy policy of cost-efficient and cost-effective administration of bankruptcy matters. *See Katchen v. Landy*, 382 U.S. 323, 328-29 (1966).

[9] One court has succinctly summarized the prior law:

> Under the former bankruptcy act, certain interlocutory orders were appealable to the court of appeals under 11 U.S.C.
>
> *(continued)*

B. Nothing in Section 158 Prevents the Application of Section 1292.

Pursuant to section 158(a), final and interlocutory orders of a bankruptcy court are initially appealable to the district court.[10] In addition, finals orders appealed pursuant to section 158(a) are further appealable to the court of appeals pursuant to section 158(d). In this regard, section 158(d) is similar to section 1291, which also provides for court of appeals jurisdiction over the final orders of the district court. However, neither section 158(d) nor section 1291 addresses in any manner the jurisdiction of the court of appeals over an interlocutory appeal from a district court order entered pursuant to section 158(a): they are both silent on the subject.

As this Court has stated, "[t]he courts are not at liberty to pick and choose among congressional enactments, and

[9] *(continued)*

> § 47(a) (1976). Under that section, orders in 'proceedings in bankruptcy' were appealable whether they were interlocutory or final. Orders in 'controversies arising in proceedings in bankruptcy,' on the other hand, were appealable only if they were final *or were certified under section 1292(b). See generally* 16 C. Wright, A. Miller, E. Cooper & E. Grossman [sic], *Federal Practice and Procedure* § 3926, at 103-04 & n. 13 (1977).

John E. Burns Drilling v. Central Bank of Denver, 739 F.2d 1489, 1491 n.5 (10th Cir. 1984) (emphasis added).

See also Scholz v. United States, 773 F.2d 709, 710 (6th Cir. 1985) (permitting interlocutory appeal of district court order reversing bankruptcy court order under 11 U.S.C. § 47(a)); *Citron Inv. Corp. v. Emrich*, 493 F.2d 561, 562 (9th Cir. 1974) (applying section 1292(b), court of appeals accepted an interlocutory appeal of a district court order affirming a bankruptcy referee's order); *McAvoy v. United States*, 178 F.2d 353, 355 (2d Cir. 1949) (finding jurisdiction under section 1292 to review affirmance by district court of injunction issued by bankruptcy referee).

[10] Alternatively, under section 158(b), appeals of final orders and, with leave, interlocutory orders of a bankruptcy court may be taken to a bankruptcy appellate panel consisting of an appellate tribunal of three bankruptcy judges in any circuit where such a panel has been created. 28 U.S.C. § 158(b).

when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This preference for giving full effect to congressional enactments wherever possible is well established. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (statutes should each be given effect where possible); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("[W]hen there are two acts upon the same subject the rule is to give effect to both if possible.").

The issue in this case involves the application of section 1292 in the bankruptcy context and raises the question of whether such application creates an irreconcilable conflict with section 158(d) such that the two cannot coexist. Some courts have made much of the silence of section 158(d) with regard to interlocutory matters by contrasting it with the provisions of section 158(a). Whereas subsection (a) provides for district court review of the final and interlocutory orders of bankruptcy courts, subsection (d) only refers to court of appeals review of final orders. As noted previously, these courts have inferred from this silence that Congress thereby intended to supersede sections 1291 and 1292.[11] However, "[c]ongressional silence, no matter how 'clanging,' cannot override the words of a statute." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.13 (1985).[12] *Accord Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989).

The silence in section 158(d) on the issue of interlocutory appeals is not a sound basis from which to infer that sections 158(d) and 1292 cannot coexist. To the contrary, the silence

[11] *See supra* page 7.

[12] This Court has frequently noted that, if Congress intends a result, it knows how to express it. *See, e.g., Toibb v. Radloff*, ___ U.S. ___, 111 S. Ct. 2197, 2204 (1991); *Mallard*, 490 U.S. at 303; *Russello v. United States*, 464 U.S. 16, 23 (1983). For example, Congress has chosen to expressly limit section 1292 jurisdiction in certain bankruptcy situations not pertinent here. See *infra* § VI.

permits both to be given effect. There is nothing in the language of section 158(d) that negates jurisdiction under section 1292(b) or creates an irreconcilable conflict with section 1292(b). Thus, application of section 1292(b) should continue in the absence of a clearly stated congressional expression to the contrary. *See Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 227 (1957) (quoting *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912) (" 'It will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.' "); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) (party contending Congress changed settled law has burden of showing intent). There is no such expression in section 158. Accordingly, this Court should conclude that both provisions are effective.

C. Application of Section 1292(b) Would Not Render Section 158(d) "Superfluous."

Some courts have rested the conclusion that section 158(d) precludes application of section 1292(b) in part on the ground that application of section 1291 would render section 158(d) "superfluous." *See, e.g., Germain*, 926 F.2d at 197 (J.A. 46). The courts that have concluded that concurrent application of section 158(d) and other jurisdictional provisions would render section 158(d) "superfluous" have done so on the basis of implicit reasoning. *See, e.g., Germain*, 926 F.2d at 194 ("The fact that [section 158(d)] would appear to be superfluous if not our exclusive source of our jurisdiction does, however, imply that it is exclusive.") (J.A. 40-41).

This reasoning contains several progressions. First, rather than conduct a direct comparison of sections 158(d) and 1292, the courts base their "superfluous" finding on a comparison of sections 158(d) and 1291. *See, e.g., Germain*, 926 F.2d at 194 (J.A. 46-47); *In re Teleport Oil Co.*, 759 F.2d 1376, 1378 (9th Cir. 1985). Recognizing that both sections 1291 and 158(d) provide for final order jurisdiction in the court of appeals, several courts have indicated that application of both provisions

appears to create something of a redundancy. *See, e.g., Teleport Oil*, 759 F.2d at 1378; *In re Kaiser Steel Corp.*, 911 F.2d 380, 385 (10th Cir. 1990). Second, these courts imply that this redundancy is repugnant to enforcing both statutes, thus creating an irreconcilable conflict. *See, e.g., Germain*, 926 F.2d at 197 (J.A. 46-47). To resolve this implicit conflict, these courts conclude that section 158(d) precludes application of section 1291 in the bankruptcy context. *Barrier*, 776 F.2d at 1299; *Teleport Oil*, 759 F.2d at 1378. Lastly, these courts infer that this preclusive effect also extends to section 1292(b). *See, e.g., Barrier*, 776 F.2d at 1299 (holding that section 158(d) "clearly supersedes 28 U.S.C. § 1291 . . . and would inferentially appear to supersede section 1292 as well").

Any apparent redundancy between sections 1291 and 158(d) does not render the two sections repugnant. They simply do not conflict. Rather, they both address the same subject in essentially the same way, *i.e.*, they both provide for identical final order jurisdiction. Lacking here is the kind of irreconcilable conflict necessary to support the conclusion that one provision overturns the other. *See Mancari*, 417 U.S. at 551; *Borden*, 308 U.S. at 198. As this Court has stated, in the context of defining when one statute may implicitly repeal another, "it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative or auxiliary." *Wood v. United States*, 41 U.S. (16 Pet.) 341, 362 (1842), *quoted in Borden*, 308 U.S. at 198. In this context, this Court has required that there be a "positive repugnancy" in order to support a finding that one act supersedes another. *Wood*, 41 U.S. at 362. Neither statute is offensive to the other and, because both are easily reconciled through concurrent application, effect should be given to both provisions. *See Mancari*, 417 U.S. at 551; *Borden*, 308 U.S. at 198.

Furthermore, this comparative analysis of sections 158(d) and 1291 does not demonstrate that application of section 1291 would render section 158(d) "entirely without meaning" as that phrase has been used by this Court. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987).[13] Although they may overlap, each provides an additional jurisdictional grant that the other does not. Section 158(d), in addition to permitting appeals from the district court to the court of appeals in bankruptcy matters, makes provision for appeals from the bankruptcy appellate panel to the court of appeals, a grant found in neither section 1291 nor section 1292.[14] Similarly, section 1291, in addition to permitting appeals from the district court to the court of appeals in bankruptcy matters, addresses all other appeals from final decisions of the district court in the myriad range of cases that court may hear. Section 158(d) does not similarly provide this jurisdictional authority as it is limited by its terms solely to bankruptcy matters.[15]

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[13] The Second Circuit described its reluctance to violate the canon of statutory construction "disfavoring interpretations that render statutory language superfluous." *Germain*, 926 F.2d at 197 (J.A. 46). Although there exists a recognized precept that it is a court's duty "to give effect, if possible, to every clause and word of a statute," *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) *quoted in Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 103 (1989), this rule does not pertain to the question before this court. Here, CNB asks that every word in all of the relevant provisions be given effect.

Perhaps the Second Circuit was concerned not with surplus language within one of these statutory provisions, but rather its belief that giving effect to section 1291 would render section 158 meaningless. As discussed above, that situation does not present itself here. *See Crawford*, 482 U.S. at 441-42.

[14] The text of section 158(d) (although then denominated section 1293) was drafted at the same time that the bankruptcy appellate panels were being conceived. Therefore, what became section 158(d) was necessary to provide the appellate process for appeals from appellate panels to the courts of appeals. *See infra* pages 24 to 25.

Further, the language found in section 158(a) was not enacted as part of section 1293: it was originally enacted as a part of 28 U.S.C. § 1482 and as an amendment to 28 U.S.C. § 1334(b) *See infra* pages 24 to 25.

[15] It bears noting that, whereas section 1291 provides generally for final order jurisdiction in the courts of appeals, section 158(d) concerns only final order jurisdiction in the bankruptcy context. As this Court has long

(continued)

Undeniably, no matter what the outcome of this appeal, both section 158(d) and section 1291 will remain as viable statutory provisions. Thus, this is not the situation addressed by this Court in *Crawford* where a broad reading of one provision would totally nullify the existence of another. 482 U.S. at 441-42 (if Fed. R. Civ. P. 54(d) is interpreted to permit discretion over all types of costs, then list of items appearing in 28 U.S.C. § 1920 would "serve[ ] no role whatsoever"). Rather, this is a case where two enactments, section 158(d) and section 1291, are both compatible and consistent and, in addition, each serves a role.

Of course, this discussion of the interrelationship of sections 158 and 1291 ignores a point of significance to this appeal. CNB did not invoke the jurisdictional grant of section 1291; it obtained certification to petition for leave to appeal pursuant to section 1292. The existence of any apparent redundancy in sections 1291 and 158(d) in no way establishes a like redundancy in sections 158(d) and 1292 because, unlike section 1291, section 1292 addresses interlocutory rather than final appeals. It cannot be said that a straightforward comparison of section 158(d) and section 1292 reveals a conflict or that their concomitant application would leave behind any surplus language. It is only through the majority's multi-stepped reasoning based on a comparison of sections 158 and 1291 that one then reaches the result that sections 158 and 1292 cannot coexist. Nothing in section 158, however, compels this result.

[15] *(continued)*

held, unless the provisions of a statute of general applicability irreconcilably conflict with the provisions of a more specific enactment, both must be given effect. *See Mancari*, 417 U.S. at 550-51. Where, as here, the general provision is not at odds with the specific, both should be regarded as effective.

D. Section 158 Does Not Embody the Entire Bankruptcy Appellate Scheme and Is Therefore Not Comprehensive.

A number of courts justify the conclusion that section 158(d) is exclusive on the grounds that it appears to be comprehensive. Grants of jurisdiction, however, are not normally exclusive. *See In re Salem Mortgage Co.*, 783 F.2d 626, 632 n.15 (6th Cir. 1986) (noting that "for example, the grant of federal question jurisdiction in 28 U.S.C. § 1331 is not exclusive of other jurisdictional bases"). *See also Continental Grain Co. v. Federal Barge Lines Inc.*, 268 F.2d 240, 241 (5th Cir. 1959), *aff'd*, 364 U.S. 19 (1960) (applying section 1292(b) in an admiralty suit prior to the merger of admiralty and civil actions). Where, as here, there is nothing in section 158 to suggest that Congress intended it to be exclusive of other jurisdictional grants, this Court should conclude that both are applicable.

Furthermore, these courts have not treated section 158(d) as comprehensive. For example, they have recognized that appeals of final and interlocutory district court orders in withdrawn bankruptcy cases are governed by sections 1291 and 1292.[16] In addition, these courts have found that § 158(d) is not so comprehensive as to exclude jurisdiction under section 110 of title 29 or section 1651 of title 28 in appropriate instances. *See, e.g., Elsinore Shore Assoc. v. Local 54, Hotel Employees*, 820 F.2d 62, 65-67 (3d Cir. 1987) (permitting direct review in the court of appeals pursuant to 29 U.S.C. § 110 of an injunction issued by a bankruptcy judge involving a labor dispute); *Salem Mortgage*, 783 F.2d at 632 n.15 (6th Cir. 1986); *In re Benny*, 791 F.2d 712, 717 (9th Cir. 1986) (noting that the majority of the circuits do not treat section 158(d) "as the sole source of jurisdiction over bankruptcy appeals"); *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (after concluding that section 158(d) excludes section 1292, court granted writ of mandamus without treating question of whether exclusivity

[16] *See supra* pages 5-6 (discussing appeals in withdrawn bankruptcy matters).

of section 158(d) extended to the All Writs Act); *In re Teleport Oil*, 759 F.2d at 1368 (9th Cir. 1985) (finding mandamus available).[17] Thus, actual appellate practice belies any claim that section 158(d) is somehow comprehensive.

The argument that Congress intended to create a comprehensive appellate scheme within the confines of section 158 seems particularly suspect when made by some of the same courts who acknowledge that section 158 is not so comprehensive as to cover appeals to the court of appeals from the district court when the district court is acting as a bankruptcy court, or to preclude review by the court of appeals of district court decisions of interlocutory orders of the bankruptcy court pursuant to section 1651 of title 28. This concession, together with the presumption against an exclusive grant of jurisdiction, suggest the conclusion that section 158 was not meant to be comprehensive.

V. ENACTMENT OF SECTION 158(d) DID NOT IMPLIEDLY REPEAL SECTION 1292(b) IN BANKRUPTCY CASES.

A cardinal rule of statutory construction that has often been repeated by this Court dictates that repeals by implication are not favored and will not be found unless the congressional intent to repeal is "clear and manifest." *Red Rock v. Henry*, 106 U.S. 596, 602 (1883). *Accord Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871). The party urging an implied repeal has a heavy

[17] Although dicta, the Seventh Circuit observed that the failure of section 158 to mention interlocutory appeals may have been mere oversight rather than a deliberate decision. Similarly, it expressed the belief that the legislative history did not support an inference that the appellate remedies of section 158(d) were intended to be exclusive. *In re Riggsby*, 745 F.2d 1153, 1156 (7th Cir. 1984).

burden in establishing this "clear and manifest" intent. *Amell v. United States*, 384 U.S. 158, 165-66 (1966). *See also Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (repeal by implication will not be lightly inferred).

A. The Circumstances Justifying Repeal by Implication Are Not Present Here.

As this Court has identified, repeal by implication may be tolerated in two specific, well-settled situations:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Posadas, 296 U.S. at 503. Neither situation is present here.

Irreconcilability has been found only where it is "impossible" to give effect to both statutes. *See Wilmot v. Mudge*, 103 U.S. 217, 221 (1880). *Accord TVA v. Hill*, 437 U.S. 153, 190 (1978); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456-57, *reh'g denied*, 324 U.S. 890 (1945) ("Only a clear repugnancy between the old law and the new results in the former giving way . . . ."); *Borden*, 308 U.S. at 198-99.

As discussed above, sections 1292(b) and 158(d) are reconcilable. Indeed, the provisions are complementary. In this case, application of one in no way renders application of the other "impossible." Similarly, section 1291 and section 158(d) do not conflict: they both provide the same appellate procedure for the same situation. It would be "the ultimate in implication" to infer a repeal of section 1291 or section 1292 by enactment of section 158(d): they simply do not give rise to any conflict. *See Crawford Fitting*, 482 U.S. at 442.

With regard to the second *Posadas* category, section 158 does not address the subject of interlocutory appeals and, as noted above, nothing in its silence on the issue should be taken as precluding review under section 1292(b). *See Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 496 n.13 (1985). *Accord Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)) ("Ordinarily, 'Congress' silence is just that – silence.' ").

Nor can it be said that section 158(d) was meant as a substitute for section 1291. Section 1291 encompasses the broad grant of final appellate jurisdiction in the courts of appeals, while section 158(d) is limited to appeals of final orders of the district courts or bankruptcy appellate panels involving matters on appeal to them from the bankruptcy courts. Thus, section 158(d) cannot be viewed as a substitute for section 1291, and certainly not for section 1292. Accordingly, the rare situations that may sometimes justify repeal by implication are not present in this instance. *See, e.g., TVA*, 437 U.S. at 187 n.33. *Accord Rubin v. United States*, 449 U.S. 424, 430 (1981).

B. The Legislative History of Section 158(d) Does Not Reveal a Clear and Manifest Intent to Repeal Section 1292.

Even if one of the *Posadas* situations were present, repeal by implication is not appropriate unless the legislature intended such a result and its intent is "clear and manifest." *Posadas*, 296 U.S. at 503. *See also Rodriguez*, 480 U.S. at 524; *Aaron v. S.E.C.*, 446 U.S. 680, 697 (1980) (requiring a "clear" expression of congressional intent to override plain meaning of statute); *Borden*, 308 U.S. at 198; *Red Rock*, 106 U.S. at 601-02. The burden of establishing this "clear and manifest" intent of Congress to repeal section 1292 by the enactment of section 158 cannot be met here.

Although the court below acknowledged that section 158 did not by its express terms repeal section 1292 in bankruptcy cases, it concluded that it did so impliedly. *Germain*, 926 F.2d

at 197 (J.A. 46-47). Overcoming the canon of construction disfavoring such implicit repeals, the Second Circuit claimed to have found the requisite "clear and manifest intent" in the legislative history of section 158(d). *Id.* The court then concluded that "Congress made a deliberate and informed policy decision" to eliminate the jurisdiction of the court of appeals over interlocutory bankruptcy decisions arising from the district court. *Id.*

An examination of the legislative materials reveals an absence of discussion or deliberation regarding interlocutory review in general and any intent to repeal section 1292(b) in particular. Indeed, when it reviewed the legislative history of section 158(d), the Third Circuit noted that "for all practical purposes there is no legislative history for the section." *Coastal Steel*, 709 F.2d at 200 n.7. *Accord Moens*, 800 F.2d at 177.

Enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA),[18] section 158(d) was added largely as a recodification of 28 U.S.C. § 1293(b).[19] Particularly noteworthy is the fact that the issue of appeals of

[18] Pub. L. No. 98-353, § 104, 98 Stat. 333 (1984). The legislative history to BAFJA is extremely limited. *See* H.R. Conf. Rep. No. 882, 98th Cong., 2d. Sess., (1984) *reprinted in* 1984 U.S. Code Cong. & Admin. News 576 (providing no discussion of section 158(d)).

[19] Because of their similarity, the legislative history of section 1293 has been looked to by courts in their attempts to determine the congressional intent behind section 158(d). *See Germain*, 926 F.2d at 194 (J.A. 41) (finding provisions to be substantially the same); *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1395 n.4 (5th Cir. 1987) (sections 158(d) and 1293 "are to be interpreted similarly because, except as noted below, there is no substantive difference between them"); *Riggsby*, 745 F.2d at 1154-55 (noting that the provisions of the two "appear to be identical"). Accordingly, when discussing the legislative history of section 158(d), it is the history of section 1293 which is being considered. *See Coastal Steel*, 709 F.2d at 200 n.7.

Section 158 is, in fact, a conglomeration of several other statutory provisions first passed by Congress as part of the Bankruptcy Reform Act

(continued)

interlocutory decisions from the district court to the court of appeals is never mentioned in this history and the subject of appeals of final decisions from the district court was not mentioned until the last amendment to section 1293. *See* 124 Cong. Rec. 33,991 (Oct. 5, 1978). In addition, section 1293 pertained only to appeals of final orders. The reference to interlocutory appeals that eventually became section 158(a) was not a part of section 1293; it was proposed by the House and enacted by the Senate in other sections of the bill. 28 U.S.C. §§ 1334(b) and 1482(b). *See* 124 Cong. Rec. 32,385 (Sept. 28, 1978) (reciting text of proposed statutes).

From this, one can observe that the focus of the amendment being proposed by the House and the Senate in section 1293 did not concern interlocutory jurisdiction of the court of appeals over district court decisions. *See id.* (district court orders are not mentioned in initial version of section 1293). Rather, the focus was on appeals to the court of appeals directly from decisions arising from the bankruptcy court and from the new bankruptcy appellate panels. *Id.* This history or, more properly, the lack thereof, regarding the creation of a new jurisdictional provision for appeals of final decisions, does not support a finding of clear and manifest intent to repeal *sub silentio* another jurisdictional statute.

[19] *(continued)*

of 1978 (Reform Act). *See* 28 U.S.C. §§ 1334, 1293 and 1482 (repealed). Subsection (a) of 158 originated from 28 U.S.C. §§ 1334(a) and (b) and § 1408. Subsection (b) of 158 was comprised of former sections 160 and 1482 of title 28. Subsection 158(d) contained the provisions previously in 28 U.S.C. § 1293. *See In re General Coffee Corp.*, 758 F.2d 1406, 1408 (11th Cir. 1985).

1. Legislative History Concerning the Enactment of Section 1293

In preparation for what ultimately became the Bankruptcy Reform Act of 1978,[20] the House passed a bill which would have created a new bankruptcy court system presided over by Article III bankruptcy judges. H.R. 8200, 95th Cong., 2d Sess., §§ 237-39, 124 Cong. Rec. 1804 (Feb. 1, 1978). As part of this system, a direct appeal would lie from the bankruptcy court to the court of appeals and sections 1291 and 1292 were proposed to be amended to so provide. *Id.* at 1786 (reciting proposed amendments to sections 1291 and 1292). The Senate, however, preferred not to grant Article III powers to bankruptcy judges. *See* 124 Cong. Rec. 32,391 (Sept. 28, 1978) (discussing differences between House and Senate proposals). Instead it provided that bankruptcy judges be subordinate to the district court in much the same manner as federal magistrates and called for appeals from the bankruptcy court to the district court. S. Rep. No. 989, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5804.

Despite the significant differences in the two drafts, no conference was held between the two houses. *See Germain*, 926 F.2d at 196 (J.A. 42). Instead, the House eventually adopted the Senate's proposal in its entirety, but with additional amendments. 124 Cong. Rec. 32,420 (Sept. 28, 1978). *See*

[20] Pub. L. No. 95-598, 92 Stat. 2549. The legislative history of the 1978 Act consists of two congressional reports, both of which were written prior to the introduction of section 1293 in the House, and the various congressional debates, none of which provide evidence of any intent to repeal section 1292(b) in the bankruptcy appellate context. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 18 (1978) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5963; H. Rep. No. 595, 95th Cong., 2d Sess., (1978) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787; 124 Cong. Rec. 32,391 (Sept. 28, 1978) (discussing differences in House and Senate proposals); 124 Cong. Rec. 32,410 (Sept. 28, 1978) (providing description of appellate provisions); 124 Cong. Rec. 32,385 (Sept. 28, 1978) (providing text of initial version of section 1293); 124 Cong. Rec. 33,991 (Oct. 5, 1978) (Senate's amendments to section 1293).

also id. at 32, 350-32, 391 (setting forth House amendments to Senate version of bill). Because the House dropped its recommendation that the bankruptcy courts be presided over by Article III judges, there was no longer any need to amend sections 1291 and 1292 to provide for appeals from this new Article III court to the circuit court. However, the House did recognize that additional jurisdictional provisions were necessary. To provide for appeals to the court of appeals from final decisions of the new bankruptcy appellate panels created by the Act and from final decisions directly from the bankruptcy court, if both sides consented,[21] the House adopted section 1293 of title 28. *See* 124 Cong. Rec. 32,385 (Sept. 28, 1978) (setting out text of section 1293).

As originally drafted by the House, section 1293 provided:

> (a) the courts of appeal shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title.
>
> (b) notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

124 Cong. Rec. 32,385. In addition, another House amendment added section 1482 to title 28. *Id.* This section provided for appeals to the new bankruptcy panels from final decisions of the bankruptcy court (section 1482(a)), and from interlocutory decisions of the bankruptcy court, if leave was granted by the appellate panel (section 1482(b)).[22] A different amendment, to section 1334(a) and (b) of title 28, mirrored these provisions for final and interlocutory appeals from the bankruptcy court to the district court.[23] The creation of sections 1293 and 1482 and the amendment of section 1334 served to complete and complement the existing jurisdictional scheme provided for in sections 1291 and 1292.

[21] This second provision, unlike the others, did not ultimately find its way into section 158 and thus did not survive BAFJA. *See In re General Coffee Corp.*, 758 F.2d 1406, 1408 (11th Cir. 1985).

[22] 124 Cong. Rec. at 32,386 (Sept. 28, 1978).

The Senate adopted all of the House amendments to the jurisdictional provisions of H.R. 8200, except that it amended the initial House version of section 1293. 124 Cong. Rec. 34,019 (Oct. 5, 1978). The Senate's amended version of section 1293 was as follows:

> (a) The court of appeals shall have jurisdiction of appeals from all final decisions of panels designated under Section 160(a) of this title.
>
> (b) notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal *from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States or* from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

124 Cong. Rec. 33,991 (Oct. 5, 1978) (amending language emphasized). The House then adopted the Senate's amendments in full. 124 Cong. Rec. 34,145 (Oct. 6, 1978).[24] The Senate's October 5 changes to section 1293 thus became its permanent language. *See* Pub. L. No. 95-598, 92 Stat. 2667 (1978).

This insertion of language in section 1293(b) by the Senate provides the basis for the Second Circuit's conclusion that section 1293 (now section 158(d)) was intended to provide the

[23] *Id.* at 32,385.

[24] The Senate's amendments are recited in the House record. 124 Cong. Rec. 34,143-34,144 (Oct. 6, 1978).

exclusive ground for jurisdiction of appeals to the court of appeals from the district court. However, there was no explanation by the Senate of its last minute effort to address court of appeals jurisdiction over district court appeals, a subject which had not been addressed by either the House or the Senate. Further, there was no deliberation between the Senate and House, in a conference report for example, which would have articulated a mutual intent to divest the court of appeals of jurisdiction or to create different appellate schemes for matters originating in the bankruptcy court as opposed to the district court. Finally, there was simply nothing about this "eleventh hour"[25] entry that concerned the issue of permitting or restricting interlocutory appeals from the district court to the court of appeals that would indicate Congress intended to oust the court of appeals from this established jurisdictional territory.

2. "Interplay" of Congressional Action is No Source of Congressional Intent.

It is noteworthy that the Second Circuit did not rely on any specific comment made in a report or by any member of either the House or the Senate regarding the intended repeal of section 1292. Whereas references to legislative history most often entail proffers of affirmative statements of legislators, which statements can be interpreted to support the claimed congressional intent,[26] this is a case where the Second Circuit had no such helpful source from which to determine intent.[27] The application or non-application of section 1292 to

[25] *Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 92 (2d Cir. 1982).

[26] *See, e.g., Continental Can v. Chicago Truck Drivers*, 916 F.2d 1154, 1156-57 (7th Cir. 1990); *United States v. South Half of Lot 7 & Lot 8 Block 14*, 910 F.2d 488, 489-90 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1389 (1991).

[27] Not everything which is offered as "legislative history" is accorded equal consideration by this Court when it endeavors to search for congressional *(continued)*

the appeal of an interlocutory decision of the district court to the court of appeals was simply not addressed. The Second Circuit was thus left to seek the legislative intent of the last minute addition to section 158(d) not from commentary on the floor of either chamber,[28] or a House or Senate report, or even a conference report, but rather from the complex and somewhat tortured path the legislation took as it was passed between the chambers.

The Second Circuit relied on the House's abandonment of its proposed amendments to sections 1291 and 1292 as an action that indicated that the House was somehow conceding that the court of appeals would not hear appeals of bankruptcy matters. *Germain*, 926 F.2d at 196 (J.A. 44). Placed in context, however, the deletion of the proposed amendments to sections 1291 and 1292, coupled with the creation of a new

[27] *(continued)*

intent. For example, in *Kelly v. Robinson*, 479 U.S. 36 (1986), this Court noted that the appearance of comments favorable to the petitioner's interpretation during the hearings and in a commission report were not worthy of attention. "[N]one of those statements was made by a member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements." *Id.* at 51 n.13. *Accord Wisconsin Public Intervenor v. Mortier*, ___ U.S. ___, 111 S. Ct. 2476, 2490 (1991) (Scalia, J., concurring) ("we are a Government of laws not of committee reports"); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988) (statements made by bill's opponents not relevant); *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988) (subsequent House Committee report rejected as authoritative on intent); *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931) (statements made to committees or on floor by non-sponsoring Senators not of import).

[28] The only congressional mention of the appellate procedure contained in section 1293 was made in the House by Congressman Edwards when he introduced the amendments that adopted the Senate's version of the new Bankruptcy scheme and proposed the creation of section 1293. 124 Cong. Rec. 32,410 (Sept. 28, 1978). His statement is merely descriptive of the originally proposed appellate scheme. It sheds no light on the final version of section 1293 because it was issued before the pertinent Senate amendment was made and did not address interlocutory appeals from the district courts to the circuit courts.

companion section 1293, indicates that the House had abandoned its Article III approach and was, instead, creating an appellate jurisdiction scheme within title 28, which scheme addressed appeals to the court of appeals from each of the three bankruptcy forums: the district court, sections 1291 and 1292; the appellate bankruptcy panel, section 1293(a) and (b); and the bankruptcy court itself, section 1293(b).[29]

Furthermore, any "interplay" between the House and Senate, *Germain*, 926 F.2d at 195-96 (J.A. 44), took place before the Senate amended section 1293 to include appeals from the district court to the court of appeals. Therefore, that interaction cannot provide a foundation of intent, even if this Court were to determine that such interplay is an appropriate basis for determining legislative intent. However, as noted by this Court, " 'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent." *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 60 (1947)). *Accord Drummond Coal Co. v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984).

Similarly, the insertion of the additional language in section 1293 at the last minute by the Senate, coupled with the failure to add language concerning interlocutory appeals, cannot fairly be categorized as a case of "actions speaking louder than words." *Germain*, 926 F.2d at 196 (J.A. 44). The language in question was added to a section that addressed final order appeals only. It is thus not telling that the added language dealt only with final order appeals. Further, the insertion of language can exhibit only an intent to include the language and no more. *See Norfolk & Western R. Co. v. American Train Dispatchers Ass'n*, ___ U.S. ___, 111 S. Ct. 1156, 1163 (1991). The mere addition of that final phrase to section 1293(b), "without giving a hint whatsoever [as to] its purpose,"[30] cannot support an intent to repeal by implication a separate, complementary and consistent statute on a different subject.

In essence, the court below inferred legislative intent from the interplay of the Congress and from the last minute insertion of additional language in section 1293 by the Senate. The drawing of inferences from such activity, as opposed to the interpretation of noteworthy commentary, fails to satisfy the "clear and manifest intent" standard espoused by this Court. *E.g., Rodriguez*, 480 U.S. at 524.[31] Certainly, any inference drawn from this activity would not establish a clear and manifest legislative intent to abrogate the jurisdiction of the court of appeals over interlocutory orders of the district court sitting in review of the bankruptcy court. *See Aaron*, 446 U.S. at 699.

The final version of section 1293 was hardly a model of clarity. *See, e.g., Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 750-51 (4th Cir. 1990) (code "does not lay out a clear appellate scheme in bankruptcy cases"); *In Re Comer*, 716 F.2d 168, 173 n.9 (3rd Cir. 1983) (referring to provision as "nearly incomprehensible"); *Coastal Steel*, 709 F.2d at 200 n.7; 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3926, at 38-43 (Supp. 1983) (also concluding that appeal provisions of 1978 Bankruptcy Reform Act were "nearly incomprehensible"). For example, the provision added by the Senate was not only somewhat repetitive in light of section 1291, it was also internally redundant.

[29] *See supra* pages 24 to 25.

[30] *Tidewater Oil Co. v. United States*, 409 U.S. 151, 168 n.41 (1972). When faced with the question of whether the creation of a method of appealing interlocutory decisions to the court of appeals was meant to supplant the original jurisdiction granted explicitly to the Supreme Court in 1903, the Court in *Tidewater* refused to find such a repeal by implication in Congress' silence. *Id.* at 159.

[31] If "passing references" to the intended purpose of a piece of legislation are insufficient to meet the "clear and manifest" burden, *Rodriguez*, 480 U.S. at 525, surely silent interplay must likewise be. *See Mancari*, 417 U.S. at 549.

The Senate added language to subsection (b) of section 1293 to allow appeals from the bankruptcy appellate panels.[32] However, such appellate jurisdiction had already been provided for by the House in section 1293(a).[33] Thus, both subsections of section 1293 provided for an identical jurisdictional grant.

To ignore the plain language of a statute requires a clear expression in the legislative history of congressional intent. Where, as here, the statutes can be reconciled, the absence of some affirmative showing of an intention to repeal will defeat a claimed repeal by implication. *See Mancari*, 417 U.S. at 550. The final amendments made by the Senate that added § 158(d) are far too curious and muddled to be said to exhibit a "clear and manifest" intent to bring about the implicit repeal of the long-standing application of section 1292 to bankruptcy

[32] *See supra* page 25.

[33] This internal redundancy was eliminated when the substance of section 1293 was transferred to § 158(d) by the enactment in 1984 of section 104 of BAFJA. 98 Stat. 341. *Compare* 28 U.S.C. § 158(d) *with* Pub. L. No. 95-598, § 236, 92 Stat. 2667 (1978) (text of section 1293). As a part of BAFJA, Congress amended the effective date of section 1293 by replacing "shall take effect on June 28, 1984" with "shall not take effect." BAFJA, § 113, 98 Stat. 343, amending § 402(b) of the Reform Act. Section 402(b) of the Reform Act provided the effective dates for Title II of the Act. Title II contained the amendments to Title 28, including the proposed § 1293. 92 Stat. 266.

Curiously, section 121(a) of BAFJA also purported to amend section 402(b) by striking "June 28, 1984" and replacing it with "the date of enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984." 98 Stat. 345. Thus, competing amendments exist, one repealing section 1293 by providing that it would never take effect and the other apparently enacting it along with the other provisions of BAFJA. The interpretation that section 1293 survived BAFJA, however, has been rejected. *See Hubbard v. Fleet Mortgage Corp.*, 810 F.2d 778, 780 n. 3 (8th Cir. 1987) (finding that Congress intended to repeal section 1293); *In re General Coffee Corp.*, 758 F.2d 1406, 1408 (11th Cir. 1985) (finding section 1293 to have been repealed, and quoting remarks of Senator Dole explaining inconsistency as a mistake); *In re Amatex Corp.*, 755 F.2d 1034, 1036-37 (3d Cir. 1985) (finding section 1293 repealed); *Riggsby*, 745 F.2d at 1155 (same).

matters. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987); *TVA v. Hill*, 437 U.S. 153, 192 (1978); *see also Ex Parte Collett*, 337 U.S. 55, 61 (1949) ("the plain words and meaning of a statute cannot be overcome by a legislative history [that] . . . may furnish dubious bases for inference in every direction"); *Wisconsin R.R. Comm'n v. Chicago Burlington & Quincy R.R.*, 257 U.S. 563, 589 (1922) (legislative history is "only admissible to solve doubt and not to create it").

C. The Absence of Limits Suggests An Implied Repeal Was Not Intended.

Section 158(d) does not enumerate the provisions that it purportedly eliminates in the bankruptcy context. Clearly Congress has not provided a list. *See United States v. Fausto*, 484 U.S. 439, 453, *reh'g denied*, 485 U.S. 972 (1988) ("[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."). It is arguable that if section 158(d) precludes any particular appellate jurisdiction, such as section 1292, then it should preclude everything, including appellate review on writs of mandamus[34] and expedited review under the Norris-LaGuardia Act.[35] If, on the other hand, the theory of implied

[34] The courts, however, cannot agree on this issue. *Compare In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (after concluding that § 158(d) excluded § 1292, court granted writ of mandamus without treating question of whether exclusivity of section 158(d) extended to the All Writs Act) *and In re Teleport Oil Co.*, 759 F.2d 1376, 1378 (9th Cir. 1985) (finding mandamus available) *with In re Kaiser Steel Corp.*, 911 F.2d 380, 386 (10th Cir. 1990) (observing that "the appellate nature of mandamus subjects it to the same limitations under § 158(d) as exist on our review of a district court's appellate decision under section 158(a)"). *See also In re Atencio*, 913 F.2d 814, 816 n.1 (10th Cir. 1990) (suggesting limitations on review by writ of mandamus).

[35] 29 U.S.C. § 110. *But see Elsinore Shore Assoc. v. Local 54, Hotel Employees*, 820 F.2d 62, 65-67 (3d Cir. 1987) (permitting direct review of an injunction involving a labor dispute issued by a bankruptcy judge in the court of appeals pursuant to 29 U.S.C. § 110).

exclusivity advanced by the courts does not go this far, there is no principle limiting the extent of the implied repeal to be found in either section 158(d) or its legislative history.[36]

The court below recognized that there may well be sound policy concerns militating against the conclusion that section 158(d) should be construed as an exclusive provision. *Germain*, 926 F.2d at 197 (J.A. 46). The Third Circuit has aptly addressed one of the more significant of these concerns:

> Coastal contends that the jurisdictional provisions of the Bankruptcy Act of 1978 (Bankruptcy Code) [sections 1293 and 1334 now codified in relevant part as sections 158(a) & (d)] preclude the exercise of this court's reviewing authority over [the questions presented]. Those provisions, Coastal contends, preempt sections 1291, 1292 and 1651. In its view, the Bankruptcy Code intended to place all pendente lite rulings of a bankruptcy court beyond the reach of the courts of appeals and the Supreme Court. Since the federal appellate courts have had the remedial powers conferred by section 1651 since 1789, and those conferred in section 1292(a)(1) since 1891, Coastal's proposition is that the Bankruptcy Code placed the bankruptcy courts in a position in which their pendente lite rulings are to be more insulated from appellate review than those of any civil federal court in history. On its face the proposition seems extreme.
>
> . . .

[36] The court below stated that:

> Section 1291 is clearly "repealed" with regard to all interlocutory decisions of bankruptcy courts except for those for which leave to appeal is granted by a district court under Section 158(a). The "repeal" we infer from Section 158(d) is thus part of a far greater explicit repeal.

Germain, 926 F.2d at 197 (J.A. 46). Nowhere in its opinion, however, does the court specifically identify what this "far greater explicit repeal" is or explain what interlocutory decisions were originally covered by section 1291.

> [The unavailability of interlocutory appellate review of orders in bankruptcy proceedings is] a question of enormous significance, involving the power of this court and of the Supreme Court to review such important matters as preliminary injunctions issued in the vast range of cases entertainable [in bankruptcy cases]. If Coastal is right, the bankruptcy courts have been given pendente lite powers, subject only to district court review, equivalent to those exercised by the federal circuit courts prior to the passage of the Evarts Act in 1891.

Coastal Steel, 709 F.2d at 197-99.

The Third Circuit ultimately declined to adopt Coastal's contentions and resolved the matter by holding that an order of the district court sitting in review of the bankruptcy court was, concurrent with section 158(d), reviewable under sections 1291, 1292 and 1651 as orders of the district court in their own right, thus avoiding the exclusivity issue. *Id.* at 199-200. In so holding, the court of appeals observed that it doubted that Congress intended such a sweeping repeal of appellate jurisdiction in the bankruptcy context, particularly in light of the absence of any discussion of such a change or of its anticipated impact. *Id.* at 200 n.7.

Where, as here, legislative history to support such an intent does not exist, and where acceptance of the concept of exclusivity would do violence to the purposes and principles underlying Congress' enactment of section 1292(b),[37] an interpretation that denies its applicability to one category of district court rulings should not be inferred.

[37] *See supra* notes 7 and 8.

VI. SUBSEQUENT LEGISLATIVE ACTION SUGGESTS THAT SECTION 158(d) WAS NOT INTENDED TO EXCLUDE APPLICATION OF SECTION 1292(b).

This Court has acknowledged that subsequent congressional actions may provide some insight into the original legislative intent. *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980). *See also Bell v. New Jersey*, 461 U.S. 773, 784-5 (1983) (view of later Congress may have "persuasive value").[38] Legislative action in 1990 suggests that Congress did not intend to foreclose section 1292(b) interlocutory appeals in bankruptcy cases when it enacted section 158.

Section 1334(c)(2) of title 28 concerns district court abstention in non-core bankruptcy cases[39] while section 305(c) of title 11 concerns bankruptcy court abstention in general.[40] In 1990, Congress added language to both of these provisions to limit the availability of appeals under section 1292.[41] If, in 1978, Congress had intended to foreclose section 1292 appeals in bankruptcy, then it would be truly anomalous for Congress to determine it necessary to expressly prohibit such appeals in sections 305(c) and 1334(c)(2) with regard to certain bankruptcy abstention orders. *See generally Rodriguez*, 480 U.S. at 524, 525; *Russello v. United States*, 464 U.S. 16, 23 (1983).

Further, when Congress added these limitations on appeals, it also amended section 158.[42] Congress did not at that time, however, include any language in section 158(d) limiting appeals under section 1292. The fact that Congress has expressly limited the availability of section 1292 with regard to sections 1334(c)(2) and 305(c), but has not done so in section 158(d), is supportive of the conclusion that Congress never intended section 158(d) to have a preclusive effect on section 1292(b). *See Andrus*, 446 U.S. at 666 n.8.

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[38] This recognition is usually followed by an admonition cautioning against the careless use of such inferences. *E.g., United States v. Price*, 361 U.S. 304, 313 (1960). The present case would not appear to present a situation where the analysis of later enactments is a hazardous venture. *Cf. Pension Benefit Guar. Corp. v. LTV Corp.*, ___ U.S. ___, 110 S. Ct. 2668, 2678 (1990).

[39] Section 1334(c)(2) is a mandatory abstention provision requiring abstention only with regard to "related to" proceedings where: (i) but for section 1334(b), the proceeding could not have been commenced in federal court and (ii) the proceeding is commenced and can be timely adjudicated in the appropriate state court. 1 *Collier on Bankruptcy* ¶ 3.01, 3-75.

[40] Section 305 concerns abstention from hearing an entire case. *See* 2 *Collier on Bankruptcy* ¶ 1 305.1, 305-2. It is a discretionary provision applicable *inter alia* where the interests of creditors and the debtor would be better served by dismissal or suspension of the entire bankruptcy matter.

[41] The two statutes as amended provide in pertinent part:

> Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise *by the courts of appeals under section 158(d), 1291, or 1292 of this title (continued)*

[41] *(continued)*

> *or by the Supreme Court of the United States under section 1254 of this title.*

28 U.S.C. § 1334(c)(2) (1990 amendment emphasized).

> An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise *by the court of appeals under section 158(d), 1291, or 1292 of this title [sic] or by the Supreme Court of the United States under section 1254 of this title [sic].*

11 U.S.C. § 305(c) (1990 amendment emphasized). *See* Pub. L. No. 101-650, § 309(a)-(b), 104 Stat. 5113.

[42] The 1990 amendments to section 158 were to the bankruptcy appellate panel provisions of section 158(b), effective December 1, 1991. Pub. L. No. 101-650, § 305, 104 Stat. 5105. Section 158(d) was not changed.

CONCLUSION

When Congress enacted section 1292(b) of title 28, it clearly intended by the plain meaning of the section's provisions that the jurisdictional grant contained in it would be applicable to bankruptcy cases. Courts have long recognized this intent and the enactment of the legislation which was eventually codified as section 158(d) should not be deemed to have repealed the applicability of section 1292(b) to any degree. Nothing in the words of section 158(d) hints at such repeal and no clear and manifest legislative intent to accomplish such a repeal can be found in its legislative history.

Therefore, the Petitioner, The Connecticut National Bank, respectfully requests this Court to hold that section 1292(b) provides discretionary jurisdiction in the court of appeals to hear an interlocutory appeal of a district court decision in a bankruptcy proceeding originating in the bankruptcy court and, further, to remand this case to the Second Circuit Court of Appeals for consideration of the Petition for Leave to Appeal filed by the Petitioner.

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November 29, 1991

No. 90-1791

In The
Supreme Court Of The United States
October Term, 1991

THE CONNECTICUT NATIONAL BANK,
Petitioner,

v.

THOMAS M. GERMAIN, TRUSTEE FOR
THE ESTATE OF O'SULLIVAN'S
FUEL OIL CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Can section 1292(b) of Title 28 of the United States Code provide a separate basis of jurisdiction for an appeal to the court of appeals of a district court order affirming, modifying or reversing an interlocutory order of a bankruptcy court, despite Congress' exclusion of language authorizing such an appeal in section 158(d) of Title 28 of the United States Code?

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

TABLE OF AUTHORITIES

CASES **PAGE(S)**

TABLE OF AUTHORITIES - continued

CASES **PAGE(S)**

TABLE OF AUTHORITIES - continued

CASES **PAGE(S)**

TABLE OF AUTHORITIES - continued

CASES **PAGE(S)**

FEDERAL STATUTES **PAGE(S)**

TABLE OF AUTHORITIES - continued

FEDERAL STATUTES **PAGE(S)**

LEGISLATION

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case. The decision of the United States Court of Appeals for the Second Circuit is reprinted in the Appendix to the Petitioner's Brief ("Petitioner's App.") at pages 34-47.

SUMMARY OF THE ARGUMENT

The petitioner argues that in regards to appeals from interlocutory orders entered by bankruptcy courts, section 1292(b) of Title 28 of the United States Code, constitutes an independent grant of jurisdiction to the United States Court of Appeals. This argument is advanced despite Congress' enactment of section 158(d) of Title 28 of the United States Code, which grants jurisdiction to the court of appeals only for final orders, decrees or judgments of district courts considering appeals of bankruptcy court decisions. The petitioner rests its argument on the lack of any language in section 158(d) prohibiting this result.

The respondent submits that Congress' enactment of section 158 evidences a clear intent to supersede the general statutory enactment set forth in sections 1291 and 1292 of Title 28 of the United States Code, which govern most decisions rendered by the district court, with the comprehensive program for appellate review of bankruptcy court decisions set forth in section 158.

ARGUMENT

I. THE COMPREHENSIVE APPELLATE PROCEDURE ENACTED BY SECTION 158 OF TITLE 28 PRECLUDES RELYING UPON SECTION 1292(b) TO GRANT JURISDICTION TO THE COURT OF APPEALS TO REVIEW AN INTERLOCUTORY ORDER BY THE BANKRUPTCY COURT

The petitioner's brief sets forth most of the background relevant to the issue on appeal, and there is no reason for the respondent to repeat this information. The petitioner's argument rests upon the contention that, for the purpose of considering an appeal of an interlocutory order entered by a bankruptcy court, sections 158(d) and 1292(b) of Title 28 constitute independent sources of jurisdiction for such an appeal.

Section 1291 of Title 28 grants to the court of appeals jurisdiction over appeals of the final decrees, orders or judgments of the district court. Section 1292 of Title 28 grants to the court of appeals jurisdiction to review appeals of certain interlocutory orders. In addition to providing for such appeals in certain specific situations, section 1292(b) permits a district court judge to certify that in the opinion of the court, such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an

immediate appeal from the order may materially advance the ultimate termination of the litigation. The court of appeals which would have jurisdiction of such an appeal may, in its discretion, permit an appeal of such an interlocutory order.

Section 158 of Title 28 is a separate statute governing appeals from decisions of bankruptcy courts. It was passed as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. This statute was enacted to resolve the constitutional issues raised in this Court's decision in Marathon Pipeline Co. vs. Northern Pipeline Const. Co., 459 U.S. 1094 (1983). Section 158(a) grants to the district court jurisdiction of appeals from final orders, judgments and decrees of the bankruptcy court, and appeals from interlocutory orders by leave of the district court. Section 158(d) grants to the court of appeals jurisdiction of appeals from all final decisions, judgment, orders and decrees entered by the district court on appeals from the bankruptcy court. Sections 1291 and 158(d) grant similar jurisdiction to the court of appeals for final orders. However, there is no equivalent grant of jurisdiction for interlocutory orders under section 158 as is ~~set~~ forth for non-bankruptcy matters under section 1292(b).

The majority of the circuits considering whether jurisdiction exists for the court of

appeals to review interlocutory orders entered by a bankruptcy court have found that the failure of section 158 to provide for such review is a clear indication that Congress did not intend such review under section 1292(b). Capitol Credit Plan of Tennessee, Inc. vs Shaffer, 912 F.2d. 749 (4 Cir. 1990); In re Topco, Inc., 894 F.2d. 727, 735 n. 12 (5 Cir. 1989); In re Benny, 791 F.2d. 712, 716-18 (9 Cir. 1986); In re Teleport Oil Co., 759 F.2d. 1376 (9 Cir. 1985). The petitioner apparently is attempting to dispute the holdings in these cases by arguing that sections 1291 and 1292 do not contain provisions conflicting with section 158, and therefore, both statutes apply to such appeals. Petitioners Brief, pages 13-14. However, this argument ignores the reasoning behind the lower court's decisions. These decisions are not based upon any conflict between language in sections 1291 and 1292, and section 158. The basis for these decisions is a recognition that section 158 was enacted as part of a comprehensive procedure for the handling of bankruptcy matters, which substantially differs from the manner by which the district courts administer non-bankruptcy matters. This comprehensive system was enacted by Congress with the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. The bankruptcy judges in a district are designated as a unit of the district court, and are identified as the bankruptcy court for

that district. 28 U.S.C. section 151. Each district can provide for the automatic referral of all bankruptcy matters to the bankruptcy court. 28 U.S.C. section 157(a) Although bankruptcy judges cannot enter final orders on related matters absent the consent of the parties to an action, a bankruptcy judge can enter final orders or judgments in cases under Title 11 of the United States Code, and in matters that are considered core proceedings arising in a case under Title 11. 28 U.S.C. section 157(b). Therefore, although the bankruptcy court is considered a unit of the district court, it in fact has a unique position in that bankruptcy judges are granted responsibility for a particular area of law, and can enter final orders and judgments without de novo review by the district court or consent of the parties.[1]

"The bankruptcy appellate scheme now enacted in 28 U.S.C. section 158, which appears to be comprehensive, clearly supersedes 28 U.S.C. section 1291, covering appeals from final judgments of the district court, and would inferentially appear to supersede section 1292 as well." Nat'l Bank of Commerce vs. Barrier,

[1] A United States Magistrate, however, except for the authority to conduct hearings and enter orders pursuant to 18 U.S.C section 3142, can only enter final orders or judgments with the consent of the parties or subject to a de novo review by the district court. 28 U.S.C. section 636 (1988).

776 F.2d. 1298, 1299 (5 Cir 1985). In addition, if sections 1291 and 1292 are available as alternative basis of jurisdiction for appeals from interlocutory decisions of the bankruptcy courts, it would render section 158(a) superfluous; there would be no reason for enacting section 158 if Congress intended sections 1291 and 1292 to be available as a basis of jurisdiction for bankruptcy court decisions. Capitol Credit Plan of Tenn., Inc., 912 F.2d. at 753. It is a basic tenet of statutory interpretation that it is presumed the legislature will not enact superfluous statutes. Crandon vs. U.S., 494 U.S. 152, 171; 110 S.Ct. 997, 1008 (1980).[2]

Such a distinction is not arbitrary. There exists a strong policy behind this distinction. If the benefits of permitting interlocutory appeals in certain situations has been recognized by Congress and the courts, it also has been recognized that permitting such appeals is not without a cost. In re American Colonial

[2] Further support for the exclusivity of section 158 for appeals from the bankruptcy courts is found in 28 U.S.C. section 157. Section 157(b)(1) states: "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, *subject to review under section 158 of this title*. (emphasis added). There is no mention of a review of such decisions under 28 U.S.C. sections 1291 or 1292.

Broadcasting Corp., 758 F.2d. 794, 800 (1st Cir. 1985). By setting up the procedure that now exists in the handling of appeals from bankruptcy courts, a new level of judicial involvement has been created for these matters. If appeals of bankruptcy court interlocutory decisions were permitted to be taken to the court of appeals, a party involved in a bankruptcy matter would be required to undergo two reviews rather than the one review required of parties in non-bankruptcy matters in the district court. Congress' limiting appellate review by the court of appeals to final bankruptcy court orders can be interpreted as recognition of this problem, and a desire to avoid imposing upon a party in a bankruptcy matter the cost associated with this additional level of review. Capitol Credit Plan of Tenn., Inc., 912 F.2d. at 753. This consideration is particularly relevant in the area of bankruptcy, since it has long been recognized that there exists important policies for expeditiously resolving bankruptcy cases. Katchen vs. Landy, 382 U.S. 323, 328-329 (1966).[3]

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[3] The petitioner cites these policies in support of its contention that appeals of interlocutory orders from the bankruptcy court should be permitted to the Court of Appeals. However, the added time and expense involved in pursuing appeals before both the district court and Court of Appeal, in fact, weighs against the petitioner's position. "The review available in the district court should eliminate most errors." Capitol Credit Plan of Tenn., Inc., 912 F.2d. at 753.

II. THE LEGISLATIVE HISTORY OF 28 U.S.C. SECTION 1293 SUPPORTS THE CONTENTION THAT THERE IS NO COURT OF APPEAL JURISDICTION FOR REVIEWING BANKRUPTCY COURT INTERLOCUTORY ORDERS

Section 1293 of Title 28 is the precursor of section 158. The legislative history relevant to the passage of section 158 of Title 28 of the United States Code is set forth in the Second Circuit's opinion in this matter, Germain v. Connecticut National Bank, 926 F.2d. 191 (2d. Cir 1991), *cert. granted*, 60 U.S.L.W. 3292 (U.S. Oct. 15, 1991). As set forth in this decision, the original legislation passed by the House of Representatives, H.R. 8200, would have conferred Article III status upon bankruptcy judges, and would have provided for amendments to sections 1291 and 1292 to provide for direct appellate review by the court of appeals of both final and interlocutory orders of the bankruptcy court. When the Senate version, S. 2266. was finally adopted by Congress, which created the current system, the amendments proposed by the House of Representatives to sections 1291 and 1292 were withdrawn. Instead, Congress proposed section 1293 of Title 28, which authorized the court of appeals' to have jurisdiction over final decisions of new bankruptcy panels, and to have jurisdiction over final decisions of the

bankruptcy courts if the parties agree to such a direct appeal. It was further proposed to amend section 1334 of Title 28 to provide for appellate review by the district court of final bankruptcy court orders and district court review of interlocutory orders of bankruptcy courts, but only by leave of the district court. No provision in these proposals made any reference to review by the court of appeals of decisions rendered by the district court reviewing decisions of bankruptcy courts. Rejecting these proposed amendments, Congress enacted section 1293(b), which included authorization for the court of appeals to review these decisions.

The withdrawal of the amendments to sections 1291 and 1292, which would have made these sections applicable to bankruptcy court orders, and the subsequent enactment of a separate statute governing appellate review of these decisions, clearly indicates a legislative intent to have section 1293 govern such appeals, rather than relying upon the statutes which govern appellate review of district court decisions in non-bankruptcy matters.

In determining legislative intent in the enactment of section 158(d), the petitioner, and also the Second Circuit Court of Appeals in its decision in this case, made reference to the statutory rule of construction that presumed repeal of a statute is only to be found by a

clear and manifest intent. Germain, 926 F.2d. at 196. (J.A. 46) However, it is difficult to see how section 158(d) in fact acts to repeal section 1292. Section 1292 applies to all non-bankruptcy matters in the district courts. Section 158(d) has limited application to bankruptcy matters. A separate statute to govern appeals of bankruptcy court decisions is justified by the fact that bankruptcy matters are handled in a different manner than non-bankruptcy matters. As noted above, such matters are automatically referred in most if not all districts to the bankruptcy courts, and the bankruptcy judges are entitled to enter final decisions, judgments or decrees in matters which are considered core proceedings. Unlike the review of decisions of United States magistrates, or bankruptcy judges issuing decisions in related bankruptcy proceedings, review by the district court of orders, judgments or decrees entered by the bankruptcy court in core proceedings requires the district courts to act as appellate courts, rather than courts of original jurisdiction. Instead of de novo review by the district courts, the standards governing appellate review would apply to the district courts. Georg vs. Parungao, 930 F.2d. 1563, 1566 (11 Cir. 1991). Therefore, section 158(d) is not in fact a repeal of section 1292, but rather a separate statutory program to handle a new judicial procedure created by Congress. Therefore, the enactment of section 158(d) does not have to

be viewed as an appeal of section 1292, but rather as a determination by Congress that the old statutory program for appellate review should not be applied to the subsequently enacted bankruptcy program.

Even if this rule of statutory construction is found to apply to the the issue in this case, this rule of construction is not the only rule relevant to the interpretation of section 158. All canons of construction are merely guidelines for the Court to observe in its examination of the legislative history and the intent of a particular statute. Rodzanower v. Touche Ross & Co., 426 U.S. 148, 164 (1976) (per dissenting opinion of Stevens, J.). Normally, two statutes capable of coexistence are each to be given effect, but only if their sense and purpose can be preserved. Watt v. Alaska, 451 U.S. 259, 267 (1981). Moreover, narrower and more specific statutes take precedence over general statutes unless the court finds a clear and manifest Congressional intent to the contrary. Crawford Fitting Co. v. J.T. Gibbons, Inc., 402 U.S. 437, 445 (1985); Busic v. United States, 446 U.S. 398, 406 (1980); Radzanower v. Touche Ross & Co., 426 U.S. at 153. These two rules of statutory construction support the contention of the respondent.

III. THE EFFECT OF DENYING COURT OF APPEAL REVIEW FOR INTERLOCUTORY ORDERS IN BANKRUPTCY MATTERS IS LIMITED BY THE RELIEF PROVIDED BY A WRIT OF MANDAMUS AND THE LIBERAL INTERPRETATION OF FINAL JUDGMENTS IN BANKRUPTCY MATTERS

A concern raised by the petitioner in its brief is the alleged detrimental effect the adoption of the respondent's position would have on parties in bankruptcy matters. Petitioner's Brief, page 33. The petitioner contends that failure to permit appeal of interlocutory orders will do violence to the purpose of section 1292. However, this fails to take into consideration that bankruptcy court interlocutory orders are already subject to potential review by the district courts. In addition, this claim also fails to take into consideration that the lack of jurisdiction over interlocutory orders will be minimized by the liberal standard applied by the courts in determining what constitutes a final order or decision in a bankruptcy case. The courts have recognized that, unlike general civil litigation, bankruptcy courts often enter final orders which can have a substantial and final effect on a number of parties. Given the nature of a bankruptcy proceeding, the courts have recognized that what constitutes a final judgment, order and decree in a bankruptcy matter must be viewed more liberally than

when that consideration is made in a general civil litigation. In re Jatran, Inc., 886 F.2d. 859, 861 (7 Cir. 1989); In re Brown, 803 F.2d. 120 (3rd Cir. 1986). Therefore, even though an order, judgment or decree may not terminate a bankruptcy case or proceeding, the courts will often find that it does constitute a final judgment, decree or order permitting review by the court of appeals. Brown, 803 F.2d. at 121. This would mitigate any detrimental effects of adopting the respondent's position. Jatran, Inc., 886 F.2d. at 861.

In addition, a writ of mandamus under section 1651 of Title 28 of the United States Code is available to the court of appeals for review of interlocutory orders of the bankruptcy courts. Nat'l Bank of Commerce, 776 F.2d. at 1299. Since the petitioner in this case did not request such relief, this Court is not considering the propriety of granting such relief in this case. Although the standard of granting a writ of mandamus is much higher than the standard for permitting appellate review of interlocutory orders, this writ is still available to a court of appeals if it feels that failure to review an interlocutory order would create a gross injustice. Coastal Steel Corp., 709 F.2d. at 198. Therefore, any detrimental effects of prohibiting the review of interlocutory orders by the court of appeals under section 1292 of Title 28 will be limited. Teleport Oil Co., 759 F.2d. at 1378.

CONCLUSION

It is apparent upon examination of section 158 and related statutes that this section is part of a program enacted by Congress for the administration of bankruptcy matters, separate from the administration of other non-bankruptcy matters handled by the district courts. Appellate review of non-bankruptcy matters is, instead, provided for in sections 1291 and 1292 of Title 28. Therefore, Congress' actions in including language in section 158 which provides for the same type of appellate review contained in section 1291, while failing to include language which permits the same type of review as provided for in section 1292, is a clear indication of Congress' intent to deny to bankruptcy court decisions the appellate review provided for in section 1292. In addition, such an interpretation advances the policy of encouraging expeditious administration of bankruptcy matters. Any detrimental effect of such an interpretation is limited by the liberal standard applied in determining whether a bankruptcy court decision is final in nature, and by the court of appeals' right to issue a writ of mandamus to provide for appellate review of interlocutory orders. Therefore, this Court should hold that section 158(d) of Title 28 prohibits a party from relying upon section 1292 of Title 28 to obtain court of appeal jurisdiction for the

review of a bankruptcy court's interlocutory orders.

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January 2, 1992

No. 90-1791

In The
Supreme Court Of The United States
October Term, 1991

THE CONNECTICUT NATIONAL BANK,
Petitioner,

v.

THOMAS M. GERMAIN, TRUSTEE FOR
THE ESTATE OF O'SULLIVAN'S
FUEL OIL CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

TABLE OF AUTHORITIES (continued)

CASES **PAGE(S)**

Federal Statutes

Other Authorities

ARGUMENT

I. ENACTMENT OF SECTION 158(d) DID NOT CREATE A COMPREHENSIVE, EXCLUSIVE SCHEME OF APPELLATE JURISDICTION IN BANKRUPTCY CASES.

The Trustee's argument proceeds from the thesis that Congress, in enacting section 158(d), determined that section 1292 should no longer apply to bankruptcy cases.[1] (Brief of Respondent at 12). Employing two rules of statutory construction, the Trustee argues that section 158 was enacted to provide a comprehensive scheme for appeals from the bankruptcy court. (*Id.* at 7, 12).

Section 1292 was applied to bankruptcy cases filed before 1978. *See, e.g., Citron Investment Corp. v. Emrich*, 493 F.2d 561, 562 (9th Cir. 1974). Congress is presumed to know the law. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). Congress is further presumed to know the judicial interpretation of that law. *Id.* at 697-98. Thus, either Congress in enacting section 158(d) meant to repeal this application of section 1292 or section 1292 continues to provide a method of limited, discretionary jurisdiction over bankruptcy matters in the court of appeals.

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[1] The Trustee appears reluctant to argue that section 1292 was impliedly repealed by the adoption of section 158(d). Indeed, he states at one point that it is "difficult to see how section 158 (d) in fact acts to repeal section 1292." (Brief of Respondent at 11). This approach differs from that of the court below which deduced an intent to repeal section 1292 from various aspects of the history of the legislation. *Germain v. Connecticut National Bank*, 926 F.2d 191, 197 (2d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3292 (U.S. Oct. 15, 1991) (No. 90-1791) (J.A. 46-47).

The Trustee's argument that section 158 constitutes a comprehensive appellate procedure in bankruptcy matters, which procedure differs from that followed in non-bankruptcy matters (Brief of Respondent at 5), finds no support in either the text of section 158 or in its legislative history.[2] In addition, this purportedly comprehensive bankruptcy appellate scheme fails to address appeals from bankruptcy matters which are heard in the first instance in the district court. *See, e.g., Matter of Topco, Inc.*, 894 F.2d 727, 736 (5th Cir. 1990). Further, the Trustee's admission that the writ of mandamus is still available in bankruptcy cases[3] undercuts his argument that section 158 is a comprehensive appellate scheme.

The Trustee seeks to buttress his position that Congress intended a comprehensive and exclusive appellate scheme in section 158 through the application of two canons of statutory construction: (1) the presumption that "the legislature will not enact superfluous statutes," (Brief of Respondent at 7); and (2) the rule that specific statutes "take precedence over general statutes, absent a clear and manifest Congressional intent to the contrary." (*Id.* at 12).

---

[2]The Trustee claims support for the exclusivity of section 158 in section 157. (Brief of Respondent at 7 n.2). However, the language cited merely reflects the fact that appeals permitted from the bankruptcy court are delineated in section 158. The language cited does not purport to address the review of district court orders entered in review of the bankruptcy court or court of appeals orders entered in review thereof.

[3]Brief of Respondent at 14.

Although both canons are available as aids in determining congressional intent, their use here is of questionable benefit.

As explained in a concurring opinion relied on by the Trustee, there is a rule of construction that "each word in a statute should, if possible, be given effect." *Crandon v. United States*, 494 U.S. 152, 171 (1990) (Scalia, J. concurring). *See also United States v. Menasche*, 348 U. S. 528, 538-39 (1955). To give effect to each word in section 158 and section 1292 is exactly what CNB asks this Court to do. There is no redundancy, or surplusage, between sections 158 and 1292. The only redundancy exists between part of section 158(d) and section 1291, which latter section is not involved in this case.

In addition, this rule in aid of construction is most helpful in construing a *single* statute, not in comparison of two separate statutes. For example, in *Crandon*, the Court was construing two paragraphs within section 209(a) of title 18 of the United States Code, 494 U.S. at 159, and in *Menasche*, the Court was construing subsections (a) and (b) of section 405 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101. 348 U.S. at 529-30. In the instant case, the Court must construe the effect of the enactment of one subsection of a statute enacted in 1984 (what has become section 158(d)) upon a section of another statute enacted more than twenty five years earlier (section 1292). As has been recognized, Congress can, and does, on occasion, enact provisions that are "superfluous." *Crandon, supra*, 494 U.S. at 174 (Scalia, J. concurring). Here, section 158(d) is, in part,

" 'merely affirmative or cumulative' " of section 1291.[4] *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), *quoting Wood v. United States*, 41 U.S. (16 Pet.) 342, 362 (1842).

The second canon relied on by the Trustee, that specific statutes take precedence over general statutes, is likewise not helpful in this appeal. This rule is typically invoked in circumstances where a specific statute directly conflicts with a general statute. *See, e.g., Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153-54 (1976) (application of a previously existing, narrow venue provision for banks versus application of a general venue statute applicable to all defendants under Exchange Act); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (provision aimed at furthering Indian self-government by permitting employment preference given effect despite later general prohibition against racial discrimination in government employment). However, section 158 does not conflict with section 1292. Absent such a conflict, the Trustee must rely on a conflict with section 1291 to then infer an intent to repeal section 1292. *Germain*, 926 F.2d at 197 (J.A. 46). However, sections 158 and 1291, in common part, provide for the same jurisdictional grant: they do not conflict. Accordingly, this second canon is not an aid to construction here.

More appropriate to the analysis required in this case is a related rule of construction that, when two statutes

[4] In addition to affirming the jurisdictional grant in section 1291, section 158(d) provides an avenue of appeal from the newly created bankruptcy appellate panels to the court of appeals, which avenue is not otherwise provided for in the Code.

are capable of coexistence, they will both be given effect. *Morton*, 417 U.S. at 551. It is only when the provisions cannot co-exist that the canons relied on by the Trustee are helpful. *Id.* at 550. "Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Radzanower*, 426 U.S. at 155.

Here, the two statutes, section 158 and section 1292, can co-exist and, as such, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton*, 417 U.S. at 551. There exists no expression of intent, let alone a "clear and manifest" one, that in enacting section 158 Congress meant to repeal the application of section 1292 to interlocutory appeals from the district court to the court of appeals and then, only in cases which originate in the bankruptcy court. *In Re Moens*, 800 F.2d 173, 177 (7th Cir. 1986).

II. THE TRUSTEE'S POLICY ARGUMENTS ARE NOT APROPOS.

The premise of the Trustee's position must be that Congress adopted section 158(d) with the intent to narrow, *i.e.*, partially repeal, the availability of discretionary, interlocutory appeals. To accept the Trustee's argument, this Court must find that Congress intended to take away from the court of appeals, and in turn, this Court, discretionary review of certain bankruptcy appeals. To impute such a design to Congress would be no small matter, for it would seem to require that Congress had suffered a loss of confidence in the

exercise of the discretion vested in the federal judicial system but only with respect to interlocutory bankruptcy appeals originating in the bankruptcy courts.

The Trustee urges a policy argument upon the Court in support of this premise: he suggests that repeal of section 1292 advances expeditious resolution of bankruptcy cases. (Brief of Respondent at 7-8).[5] However, policy arguments are not appropriate in this context. The question before the Court is not whether Congress could have obtained the result the Trustee urges nor is it whether Congress should have caused that result. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by Congress is to be put aside in the process of interpreting a statute."). Policy considerations are for Congress, not the Court. The Court's duty is to determine what Congress intended when it enacted section 158 of title 28 of the United States Code. *Id.*

In addition to being inappropriate, the Trustee's policy argument proceeds from a rather narrow perspective. He assumes that the time and money of bankruptcy court litigants is saved by repeal of the applicability of section 1292 in some bankruptcy cases. (Brief of Respondent at 7-8). This perspective ignores the important, long-recognized benefit of vesting the appellate courts with the discretionary power to review, prior to final judgment, important questions of law, consideration of which not only may advance the case

[5] The Trustee's policy argument is not expressed in the legislative history of section 158. (Brief of Petitioner at 23-26).

at issue, but also establishes the rule of law for other litigants.[6] *See Ford Motor Credit Co. v. S.E. Barnhart & Sons, Inc.*, 664 F.2d 377, 380 (3d Cir. 1981). *See generally Church of Scientology v. Internal Revenue Serv.*, 792 F.2d 153, 155 n.1 (D.C. Cir. 1986), *cert. granted*, 479 U.S. 1063, *aff'd*, 484 U.S. 9 (1987) ("appellate review serves a dual purpose: the correction of legal error and the establishment of legal rules for future guidance"). The answer to the question presented to this Court by CNB in this appeal, however, will not be found in the area of policy rationales, but rather is apparent from the language of the pertinent statutory provisions.

CONCLUSION

The Trustee urges this Court to conclude that Congress intended to alter an appellate scheme, for those bankruptcy cases referred to bankruptcy courts only, and to take from the district court and court of appeals the shared discretion to allow limited interlocutory appeals to the court of appeals. In the absence of statutory language or clear intent expressed in the legislative history, the Trustee argues that such a result is justified for policy reasons and is required in order to give meaning

[6] At least one commentator, in concluding that § 1292 applied to bankruptcy cases, observed that the availability of such appeals "might often accomplish some benefits." 16C Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3926 n.13 (1977 Ed.). (Brief of Petitioner at 10-11 n.9).

to the seemingly innocuous redundancy that exists between section 158(d) and section 1291. Such a change, however, is rarely brought about by silence, and it would be improper for this Court to assume congressional intent from such silence. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). Permitting court of appeals jurisdiction over interlocutory orders under section 1292 and over final orders under section 158(d), however, would give meaning to both provisions in the context of bankruptcy appeals.

Because there exists no basis to support the conclusion that Congress intended section 158(d) to preclude application of section 1292, the Court should reverse the Second Circuit Court of Appeals by adopting the interpretation urged by CNB and thereby avoid the results presented by the interpretation urged by the Trustee.

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